154 U.S. 111

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 329.

HARRIETT A. BALKAM, GERTRUDE ALEXANDER, AND ADELLA MORRIS, PLAINTIFFS IN ERROR,

vs.

THE WOODSTOCK IRON COMPANY, THE ANNISTON CITY LAND COMPANY, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 24, 1890.

(14,379.)

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1 In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

HARRIET A. BALKAM
v.
THE WOODSTOCK IRON COMPANY.

The plaintiffs, Harriet A. Balkam, Gertrude Alexander, and Adella Morris, who are citizens of the State of Texas, sue to recover of the defendants, The Woodstock Iron Company and The Anniston City Land Company, citizens of the State of Alabama and corporations existing under the laws of Alabama and doing business in Calhoun county and in the southern division of the northern district of said State, and Cicero Roberts, a citizen of the State of Alabama, who resides in the southern division of the northern district of Alabama, possession of the following tract of land:

The southwest quarter of the southwest quarter of section twenty-nine (29), the northwest quarter of the northwest quarter of section thirty-two (32), the south half of the southeast quarter of section thirty (30), the northeast quarter and the north half of the southeast quarter and the southwest quarter of the southeast quarter of section thirty-one (31), all in township fifteen (15), range eight east (8 east*l*), and lying and being in Calhoun county, Alabama, and within the southern division of the northern district of said State, which said tract of land is worth more than fifty thousand dollars, of which the plaintiffs were in possession and upon which, pending such possession and before the commencement of this suit, the defendants entered and unlawfully withhold, together with five thousand dollars for the detention thereof.

JAMES H. SAVAGE,
KELLY & SMITH,
SMITH & LOWE,
Attorneys for Plaintiffs.

Endorsed: Filed in clerk's office this 8 day of June, A. D. 1889. A. W. McCullough, clerk.

2 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama, Southern Division.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon the Woodstock Iron Company & the Anniston City Land Company, corporations existing under the laws of Alabama, and Cicero Roberts, who are citizen- of the State of Alabama, to appear before the hon. circuit court aforesaid at the place of holding said court, at Birmingham, on the first Monday of Sept. next, to answer the complaint of Harriett A. Balkam, Gertrude Alexander, and Adella Morris, who are *who are*

citizen of the State of Texas, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first Monday of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Issued the 10 day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Attest: A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Ala.

3 [Endorsed:] No. 110. Circuit court of the United States, northern district of Alabama, southern division. Summons and complaint. Harriett A. Balkham *et al. vs.* The Woodstock Iron Company *et al.* Issued this 10 day of June, 1889. A. W. McCullough, clerk. Returned and filed this 13 day of June, 1889. A. W. McCullough, clerk. ——— ———, plaintiffs' attorney. Received in office this 10 day of June, 1889. A. H. Keller, U. S. marshal. Executed by serving a copy of the within summons and complaint on defendant Cicero Roberts, and by serving a copy of the within summons and complaint on A. L. Tyler, the president of the defendant The Woodstock Iron Company, and by serving a copy of the within summons & complaint on John M. McKleroy, the president of defendant The Anniston City Land Company, this the 11th day of June, 1889. A. H. Keller, U. S. marshal, by A. S. Stewart, deputy. Serving 3 copies, 2.00, $6.00; mileage, 25 @ 6, 1.50—$7.50.

4 In the Circuit Court of the United States for the Southern Division of the Northern District, Alabama.

HARRIET A. BALKAM *et als.*
v.
F. M. HIGHT *et als.*, Defendants.

The plaintiffs, Harriet A. Balkam, Gertrude Alexander, and Adella Morris, who are citizens of the State of Texas, sue to recover of the defendants, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, William J. Chappell, and John T. Butenshon, citizens of the State of Alabama and who reside in the southern division of the northern district of said State, possession of the following tract of land:

The southwest quarter of the southeast quarter of section thirty-one (31), township fifteen (15), range eight (8), lying and being in Calhoun county, Alabama, and within the southern division of the northern district of said State, which said tract of land is worth forty thousand dollars, of which the plaintiffs were in possession, and upon which, pending such possession and before the commencement of this suit, the defendants entered and unlawfully withhold, together with five thousand dollars for the detention thereof.

JAMES H. SAVAGE,
KELLY & SMITH,
SMITH & LOWE,
Attorneys for Plaintiffs.

Endorsed: Filed in clerk's office this 11th day of June, A. D. 1889. A. W. McCullough, clerk.

5 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama, Southern Division.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, William J. Chappell, and John T. Butenshon, who are citizen- of the State of Alabama, to appear befere the hon. circuit court aforesaid, at the place of holding said court, at Birmingham, on the first Monday of Sept. next, to answer the complaint of Harriett A. Balkam, Gertrude Alexander, and Adella Morris, who are citizen- of the State of Texas, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first Monday of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Issued the 11th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Attest: A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Ala.

6 [Endorsed:] No. 111. Circuit court of the United States, northern district of Alabama, southern division. Summons and complaint. Harriett A. Balkam *et al. vs.* F. M. Hight *et al.* Issued this 11th day of June, 1889. A. W. McCullough, clerk. Returned and filed this 13 day of June, 1889. A. W. McCullough, clerk. —— ——, plaintiffs' attorney. Received in office this 11th day of June, 1889. A. H. Keller, U. S. marshal. Executed by serving a copy of the within summons and complaint on defendant-, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, W. J. Chappel, and John T. Butenshon, this the 11 day of June, 1889. A. H. Keller, U. S. marshal, by A. S. Stewart, deputy. Serving 6 copies, 2.00, $12.00; mileage, —, $—.

7 HARRIET A. BALKAM *et al.* }
v. } No. 110.
WOODSTOCK IRON COMPANY. }

Cause pending in the United States circuit court for the southern division of the northern district of Alabama.

September Term, 1889.

And now comes the defendant, The Woodstock Iron Company, in the above-entitled cause and pleads separately, and for answer to the complaint says—

I. That it disclaims possession of all that part of the property described in the complaint that lies within the corporate limits of

the city of Anniston; and to the rest of said land described in said complaint the defendant says that it is not guilty of the matters therein alleged.

II. And for further answer to the complaint the defendant says that the cause of suit asserted therein is barred by the statute of limitations of ten years.

III. And for further answer to the complaint defendant says that the cause of suit asserted therein is barred by the statute of limitations of twenty years.

IV. And for further answer to the complaint defendant says that the defendant and those under whom it claims have been in open, notorious, exclusive, and continuous adverse possession of the lands described in the complaint, the possession of which is not disclaimed, for more than twenty years prior to the commencement of said suit.

KNOX & BOWIE,
CALDWELL & JOHNSTON,
Attorneys for Defendant.

Endorsed: Filed in clerk's office this 3 day of Sept., A. D. 1889. A. W. McCullough, clerk.

8 HARRIET A. BALKAM *et al.* *v.* ANNISTON CITY LAND COMPANY *et al.* } No. 110.

Cause pending in the United States circuit court for the southern division of the northern district of Alabama.

September Term, 1889.

And now comes The Anniston City Land Company and Cicero Roberts, defendants in the above-entitled cause, and plead jointly and separately, and for answer to the complaint say—

I. That they disclaim possession of all of said land therein described that lies outside of the city of Anniston, and also the following tract or parcel of land that lies within the city of Anniston, to wit, ten acres in the southeast corner of the southwest quarter (W. W. ¼) of the southeast (S. E. ¼) quarter of section thirty-one (31), township 15, fifteen, range eight (8), in Calhoun county, Alabama, and as to the rest of the land described in said complaint the defendants say that they are not guilty of the matters therein alleged.

II. And for further answer to the complaint defendants say that the cause of suit asserted therein is barred by the statute of limitations of ten years.

III. And for further answer to the complaint defendants say that the cause of suit asse-ted therein is barred by the statute of limitations of twenty years.

9 IV. And for further answer to the complaint defendants say that defendants and those under whom they claim have been in open, notorious, exclusive, and continuous adverse possession of the lands described in the complaint, the possession of which

is not disclaimed, for more than twenty years prior to the commencement of said suit.

KNOX & BOWIE,
CALDWELL & JOHNSTON,
BROTHERS, WILLETT & WILLETT,
Attorneys for Defendants.

Endorsed: Filed in clerk's office this 3 day of Sept., A. D. 1889. A. W. McCullough, clerk.

10 HARRIET A. BALKAM *et al.* v. F. M. HIGHT *et al.* } No. 111.

Cause pending in the United States circuit court for the southern division of the northern district of Alabama.

September Term, 1889.

And now comes F. M. Hight, William Chappell, John A. Fry, Felix L. Hunter, John T. Butenshon, and Ed. Farmer, defendants in the above-entitled cause, and plead jointly and separately, and for answer to the complaint say:

I. That they disclaim possession of all the land sued for in said complaint, except ten acres in the southeast corner of the southwest quarter (S. W. ¼), southwest quarter of the (S. E. ¼) southeast quarter of section thirty-one (31), township fifteen (15), range eight (8), and as to the said ten (10) acres of land defendants say that they are not guilty of the matters therein alleged.

II. And for further answer to the complaint defendants say that the cause of suit asserted therein is barred by the statute of limitations of ten years.

III. And for further answer to the complaint defendants say that the cause of suit asserted therein is barred by the statute of limitations of twenty years.

IV. And for further answer to the complaint defendants say that defendants and those under whom they claim have been in open, notorious, exclusive, and continuous adverse possession of the lands described in the complaint, the possession of which is not disclaimed, for more than twenty years prior to the commencement of said suit.

KNOX & BOWIE,
CALDWELL & JOHNSTON,
Attorneys for Defendants.

Endorsed: Filed in clerk's office this 3 day of Sept., A. D. 1889. A. W. McCullough, clerk.

11 THE UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

Be it remembered that heretofore, to wit, on the 10th day of September, A. D. 1889, it being a day of the regular term of the circuit court of the United States for the southern division of the northern

district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of September, A. D. 1889, and of the Independence of the United States of America the one hundred and 14th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said court, to wit:

HARRIET A. BALKAM *et als.*
vs.
THE WOODSTOCK IRON COMPANY *et als.* } 110.

This cause coming on to be heard on defendants' motion to require plaintiffs to pay costs of former action of ejectment accruing in State courts, after argument of counsel and due consideration, it is ordered by the court that said motion be, and the same is hereby, overruled; to which ruling of the court the defendants, by counsel, except.

12 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 10th day of September, A. D. 1889, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of September, A. D. 1889, and of the Independence of the United States of America the one hundred and 14 year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

HARRIET A. BALKAM *et als.*
vs.
F. M. HIGHT *et als.* } 111.

This cause coming on to be heard on defendants' motion to require plaintiffs to pay costs of former action of ejectment accruing in State courts, after argument of counsel and due consideration, it is ordered by the court that said motion be, and the same is hereby, overruled and denied; to which ruling of the court the defendants, by counsel, except.

13 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 11 day of September, A. D. 1889, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of September, A. D. 1889, and of the Independ-

ence of the United States of America the one hundred and 14th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

HARRIET A. BALKAM *et als.*
v.
THE WOODSTOCK IRON COMPANY *et als.* } 110.

Come the parties, by their attorneys, and, on motion and for cause shown, it is ordered by the court that this cause be continued.

14 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 11th day of September, A. D. 1889, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of September, A. D. 1889, and of the Independence of the United States of America the one hundred and 14th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

HARRIET A. BALKAM *et als.*
vs.
F. M. HIGHT *et als.* } 111.

Come the parties, by their attorneys, and, on motion and for cause shown, it is ordered by the court that this cause be continued.

15 HARRIET A. BALKAM *et als.*
v.
WOODSTOCK IRON COMPANY. } No. 110.

HARRIET A. BALKAM *et als.*
v.
F. M. HIGHT *et als.* } No. 111.

FRANCIS M. FULLENWIDER
v.
WOODSTOCK IRON COMPANY *et als.* } No. 112.

FRANCIS M. FULLENWIDER
v.
CICERO ROBERTS *et als.* } No. 113.

In the United States Circuit Court at Birmingham, Alabama.

SEPTEMBER 12, 1889.

It is agreed by and between the parties to the above-named causes, viz., No. 110, 111, 112, and 113, that the unsuccessful party

or parties shall have, after judgment shall have been rendered, sixty days within which to prepare and have signed a bill of exceptions in the case or cases above named, said bill or bills of exceptions to be first submitted to opposing counsel at least six days before presenting the same to the judge.

September 12, 1889.

J. H. SAVAGE,
KELLY & SMITH,
SMITH & LOWE, *Attorneys for Plaintiff-.*
KNOX & BOWIE,
CALDWELL & JOHNSTON,
BROTHERS, WILLETT & WILLETT,
D. C. BLACKWELL, *For Defendants.*

Endorsed: Filed in open court this Sept. 12, 1889. A. W. McCullough, clerk.

16 HARRIET A. BALKAM *et als.* v. WOODSTOCK IRON COMPANY. } No. 110.

Cause pending in the United States circuit court at Birmingham, Alabama.

HARRIET A. BALKAM *et al.* v. F. M. HIGHT *et als.*

Cause pending in the United States circuit court at Birmingham, Alabama.

It is agreed by the parties to the above-stated causes that the same be consolidated and tried together as one cause.

KNOX & BOWIE,
CALDWELL & JOHNSTON,
D. C. BLACKWELL,
BROTHERS, WILLETT & WILLETT,
Attorneys for Defendants.
JAMES H. SAVAGE,
KELLEY & SMITH,
SMITH & LOWE, *Attorneys for Plaintiffs.*

Endorsed: Filed March 10th, 1890. A. W. McCullough, clerk.

17 THE UNITED STATES OF AMERICA, *Northern District of Alabama, Southern Division.*

Be it remembered that heretofore, to wit, on the 10th day of March, A. D. 1890, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of March, A. D. 1890, and of the Independence of the United States of America the one hundred and 14th year—

present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

HARRIET A. BALKAM *et als.*
vs.
THE WOODSTOCK IRON CO. *et als.* } 110.

HARRIET A. BALKAM *et als.*
vs.
F. M. HIGHT *et als.* } 111.

These causes coming on to be heard, the attorneys for plaintiffs and defendants in both suits agree, in writing, that the said causes be consolidated into one suit. It is therefore considered and ordered by the court that said suits be, and the same are hereby, consolidated into one cause for the recovery of all the lands in controversy in both suits and against all the defendants in both suits; and the said cause so consolidated coming on to be heard, come the parties, by their attorneys; comes also a jury of good and lawful men, to wit, E. R. Vincent and eleven others, who are duly elected, empaneled, and sworn herein to well and truly try the issues joined and a true verdict render according to the evidence, who, after listening to the evidence by the parties adduced, arguments of counsel, and charge of the court, render their verdict, in writing, signed by their foreman, and upon their oath do say—

"We, the jury, find the issues in favor of defendants.
"E. R. VINCENT, *Foreman.*"

It is therefore considered by the court that the defendants go hence discharged from this suit, and that the plaintiffs pay the costs of this proceeding, for which let execution issue.

18 HARRIET A. BALKAM *et al.*
v.
THE WOODSTOCK IRON COMPANY *et al.* } No. 110.

and

HARRIET A. BALKAM *et al.*
v.
F. M. HIGHT *et al.* } No. 111.

Be it remembered that on the trial of the above-stated causes in the circuit court of the United States for the southern division of the northern district of Alabama, at Birmingham, Alabama, the Honorable John Bruce, district judge, present and holding said court, the same were, by agreement of counsel for the parties in writing and by order of this court, consolidated, tried together, and treated as one cause for the recovery by plaintiffs of the lands included in both suits, and, upon the trial of said causes as consolidated, the following proceedings were had, viz:

Counsel for the parties entered into an agreement in writing, the recitals of which were submitted as facts proven upon the trial. That part of which agreement that relates to plaintiffs' case was introduced in evidence by the plaintiffs without objection and is in the following words and figures, to wit:

19 *Plaintiffs' Evidence.*

It is agreed that plaintiffs' evidence in each of the above-stated causes will show that Samuel P. Hudson is the common source of title, and that he died intestate August, 1863, seized and possessed of the lands sued for, in connection with other contiguous lands; that at his death said Samuel P. Hudson left surviving him his widow, Kezia A. Hudson; that said Samuel P. Hudson resided on the lands in controversy from 1858 up to the time of his death in 1863, and that his wife, Kezia A. Hudson, and the other members of the family continued to reside on the said lands involved in the several suits above stated and used and occupied the same as a home and farm until the spring of 1869, when she, with her family, moved to Jacksonville, some ten (10) miles distant; that the widow, Kezia A. Hudson, died June (26th) twenty-sixth, 1879.

It is also agreed that the plaintiffs' evidence will show that the plaintiffs in the above-stated causes are the only heirs-at-law of the said Samuel P. Hudson, deceased (except Mrs. Frances M. Fullenwider, a daughter of said Hudson), and were his only heirs (excepting Mrs. Fullenwider, who is also an heir), June 1st, 1887, and that Frances M. Fullenwider is his daughter, and was born August the third, 1845; that Harriet A. Balkam is his daughter, and was born November 13th, 1853; that Gertrude Alexander is his daughter, and was born October 2nd, 1856; that Adella Morris is his granddaughter, and was born April 10th, 1867, and is the only child of Adella Van Hagan, who was the daughter of the said Samuel P. Hudson, and who was born June 14th, 1847, and died April 23rd, 1867; that said Harriet A. Balkam, Gertrude Alexander, and Adella Morris were citizens of the State of Texas when each of said suits were brought, are now citizens of the State of Texas, and have been for several years.

It is also agreed that the plaintiffs' evidence will show that the ten (10) acres sued for lying and being in the southeast corner of the southwest quarter (S. W. ¼) of the southeast quarter (S.
20 E. ¼) of section thirty-one (31) is worth eleven hundred ($1,100.00) dollars per acre; that the other lands included in said suit are worth five hundred ($500.00) dollars per acre, and that said lands were worth so much when said suits were brought; that neither the defendants nor those under whom they hold have put any permanent improvements on said lands, except on the ten (10) acres in the southeast corner of the southwest quarter (S. W. ¼) of the southeast quarter (S. E. ¼) of section thirty-one (31), and that the improvements on said ten (10) acres are worth about one thousand ($1,000.00) dollars, and were put on the lands in 1887 and 1888.

It is also agreed that the plaintiffs' evidence will show that an action similar to those above stated was brought by the plaintiffs in the said several suits above stated against the defendants therein on June 28th, 1887, for the recovery of the lands involved in the said several suits above stated in the circuit court of Calhoun county, Alabama, and that judgment was rendered therein for the plaintiffs for the lands involved in this controversy except as to the ten (10) acres in the southeast corner of the southwest quarter (S. W. ¼) of the southeast quarter (S. E. ¼) of section thirty-one (31), which has never been tried in said circuit court, and that such judgment was reversed on appeal by the supreme court of Alabama on May 28th, 1889, and judgment rendered for defendants by said supreme court, and judgment was rendered against the plaintiffs for $254.25 *dollars*, costs, which is still in force and not satisfied. The plaintiff next introduced in evidence without objection a certified copy of the records of the probate court of Calhoun county, Alabama, in regard to the allotment of dower to the widow of Samuel P. Hudson, in words and figures following:

21 To the — Alexander Woods, judge of the probate court of Calhoun —, State of Alabama:

Your petitioner, Kizia A. Hudson, a citizen of the county of Calhoun and State of Alabama, over the age of twenty-one years, respectfully represents that she is the widow of Samuel P. Hudson, deceased, late of said county; that she was married to the said Samuel P. Hudson in the State of South Carolina in the year 1844; that her said husband, Samuel P. Hudson, departed this life in August, A. D. 1863, in the said county of Calhoun; that at the time of his death and many years previous thereto he resided in the said county of Calhoun and was residing upon the lands hereinafter mentioned.

That her said husband died seized and possessed of the following lands, to wit:

Northwest quarter of section 16, W. ½ of northwest ¼ and S. W. ¼ of N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of section 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of section 20, and the south ½ of section 29 and the south ½ of the N. E. ¼ of section 29; also the N. W. ¼ of section 30 and the S. W. ¼ of N. E. ¼ of said section 30, and east half of southeast ¼ and southwest ¼ of southeast ¼ of section 30 and southwest ¼ of southwest ¼ of section 30; also northeast ¼ of section 31 and W. ½ of southeast ¼ of section 31, and also N. E. ¼ of S. E. ¼ of section 31; also the W. ½ of the N. W. ¼ of section 32 and N. ½ of N. E. ¼ of section 32 and N. E. ¼ of S. W. ¼ of section 32, all in township 15, range 8 E., in the Coosa land district, and lying and being in said county of Calhoun and known as the steam-mill lands, between Oxford and Jacksonville; that at the time of the death of her said husband, Samuel P. Hudson, he resided and lived upon said land and was seized and possessed of the same, and your petitioner has since then and at this time lives upon said lands.

Your petitioner further states that her said husband departed this life leaving the following heirs-at-law, viz: Your petitioner, the

widow of said Hudson, and the following children, to wit,
22 Della F. Van Hagan, wife of Hiram W. Van Hagan: Frances M. Hudson, James B. Hudson, all of whom are over the age of fourteen years, but under twenty-one, except Hiram W. Van Hagan, who is over twenty-one; all reside with your petitioner in the said county of Calhoun; also Harriet A. Hudson and Gertrude T. Hudson, minors under the age of fourteen, and reside with your petitioner, who is the mother of all of said children.

Your petitioner further represents that James F. Grant has been appointed administrator of the goods and estate of said S. P. Hudson, and has qualified and given bond as such administrator, and that said Grant resides in the said county of Calhoun.

The premises considered, your petitioner prays that dower be assigned her, and that your honor will grant an order for the assignment of dower in the lands aforesaid; that your honor will give notice of this your petitioner's application for dower to the said James F. Grant, administrator aforesaid, and also to said Hiram W. Van Hagan and to the other children aforesaid of the said Samuel P. Hudson, to wit, Frances M. Hudson, James R. Hudson, Harriet A. Hudson, and Gertrude E. Hudson; that guardian *ad litem* be appointed for said minor children; that such notices be issued and such orders granted and proceedings had as is required by the statute in such case made and provided, in order that your petitioner may have her dower assigned her in the lands aforesaid, and a decree be made by your honor's court appointing commissioners, etc.; and your petitioner, as in duty bound, will ever pray, etc.

KEZIA A. HUDSON,
Petitioner, etc.

Sworn to and subscribed before me this 11th day of January, 1866.

A. WOODS,
Judge of Probate.

We accept notice of the foregoing application, waive notice and copy, and etc.

ADELLA F. VAN HAGAN.
H. W. VAN HAGAN.

Filed in office January 11, 1866, and recorded Sept. 7, 1866.
A. WOODS,
Judge of Probate.

23 To the Hon. Alexander Woods, judge of the probate court for the county of Calhoun and State of Alabama:

The undersigned, L. W. Cannon, who has been appointed by the honorable probate court for Calhoun county, Alabama, guardian *ad litem* for the minor children of S. P. Hudson, deceased, to wit, Frances M. Hudson, Della F. Van Hagan, James R. Hudson, Harriet A. Hudson, and Gertrude E. Hudson, do hereby accept the appointment of guardian *ad litem* to protect the interest of said minors in

the matter of the application of Kezia A. Hudson, widow of said S. P. Hudson, for an assignment of dower in and to certain lands set forth in her petition, filed in the probate court office of said county on the — of January, 1866.

Witness my hand this the 12th day of January, 1866.

L. W. CANNON,
Guardian ad Litem.

Filed in office 12th day of January, 1866, and recorded September 7th, 1866.

A. WOODS,
Judge of Probate.

24 Court of Probate for Calhoun County, Alabama.

JANUARY THE 11TH, A. D. 1866.

This day came into court Kezia A. Hudson, a citizen of said county, and presents and files in court her petition, representing that she is the widow of Samuel P. Hudson, deceased; that she was married to the said Samuel P. Hudson, in the State of South Carolina, in the year 1844; that her said husband, Samuel P. Hudson, departed this life, in August, A. D. 1863, in the said county of Calhoun; that at the time of his death and for many years previous thereto said decedent resided in the said county of Calhoun, and was residing upon the lands hereinafter mentioned; that her said husband, Samuel P. Hudson, died seized and possessed of the following-de-scribed lands, to wit:

The N. W. ¼ of section 16, W. ½ of N. W. ¼ and S. W. ¼ of N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of section 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 20, and S. ½ of sec. 29, and S. ½ of N. E. ¼ of sec. 29, and N. W. ¼ of sec. 30, and S. W. ¼ of N. E. ¼ sec. 30, and E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of sec. 30, and S. W. ¼ of S. W. ¼ of sec. 30, and N. E. ¼ of sec. 31, and W. ½ of S. E. ¼ of sec. 31, and N. E. ¼ of S. E. ¼ sec. 31, and W. ½ of N. W. ¼ of sec. 32, and N. ½ of N. E. ¼ of sec. 32, and N. E. ¼ of S. W. ¼ sec. 32, all in township 15, of range 8 east, in the Coosa land district, and lying in said county of Calhoun, and known as the Steam Mill lands, between Oxford and Jacksonville. Petitioner further states that her said husband, S. P. Hudson, at the time of his death resided and lived upon said lands and was seized and possessed of the same, and petitioner has since then and at this time resides upon said lands. Petitioner further says that said decedent left the following heirs, to wit, petitioner, his widow, and the following children, to wit, Adella F. Van Hagan, wife of Hiram W. Van Hagan; Frances M. Hudson, James B. Hudson, all of whom are over the age of 14 and under the age of 21 years, except Hiram W. Van Hagan, who is over 21 years of age; also Harriet A. Hudson and Ger-
25 trude E. Hudson, minors under the age of fourteen (14) years, and all reside with said petitioner, who is the mother of the said children. Petitioner further represents that James F. Grant has been appointed administrator of the estate of said Hudson, de-

ceased, and that said Grant resides in said county of Calhoun. Petitioner asks that dower be assigned to her out of the lands described as aforesaid. The heirs and distributees are hereby notified that the 26th day of January, 1866, said petition will be heard and determined upon by the court. They can therefore attend at a special term of said court to be holden at the court-house of said county on said 26th day of January, 1866, and defend against said petition, if they think proper. It is further ordered that L. W. Cannon be, and he is hereby, appointed guardian *ad litem* for said minor heirs of said estate to protect their interest in the foregoing application.

A. WOODS,
Judge of Probate.

26 Court of Probate for Calhoun County, Alabama.

JANUARY THE 12TH, 1866.

It appearing to the court that at a certain term of this court, held on the 11th day of January, 1866, L. W. Cannon was, by an order of this court, appointed the guardian *ad litem* for the minor heirs and distributees of the estate of Samuel P. Hudson, deceased, for the purpose of protecting their interests in an application by their mother, Kezia A. Hudson, for the assignment of dower in certain lands of the estate of said decedent, and came the said Cannon and files in court his written consent and agreement to act as guardian *ad litem* as aforesaid, it is therefore ordered by the court that said appointment of guardian *ad litem* be, and the same is hereby, confirmed, and that said consent be recorded and filed in office.

A. WOODS,
Judge of Probate.

27 Court of Probate for Calhoun County, Alabama.

JANUARY 26TH, A. D. 1866.

On this the 26th day of January, A. D. 1866, before the probate court of Calhoun county, Alabama, personally came Kezia A. Hudson, widow of Samuel P. Hudson, late of said county, deceased, and files her petition in this court alleging that she is the widow of said Samuel P. Hudson; that she is entitled to her dower or one-third part of certain tracts or parcels of land lying in the county of Calhoun and State of Alabama and known as the N. W. ¼ of sec. 16, W. ½ of N. W. ¼ and S. W. ¼ of N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of sec. 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 20, and S. ½ of sec. 29, and S. ½ of N. E. ¼ of sec. 29; also N. W. ¼ of sec. 30 and S. W. ¼ of N. E. ¼ of sec. 30, E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of sec. 30 and S. W. ¼ of S. W. ¼ of sec. 30; also N. E. ¼ of sec. 31 and W. ½ of S. E. ¼ of sec. 31, and also N. E. ¼ of S. E. ¼ of sec. 31; also W. ½ of N. W. ¼ of sec. 32 and N. ½ of N. E. ¼ of sec. 32 and N. E. ¼ of S. W. ¼ of sec. 32, all in township 15, of range 8 east, of the Coosa land district, whereof the said Samuel P. Hudson during their intermarriage was seized and possessed; and it appearing to the satisfaction of the court that J. F. Grant,

the administrator of the goods and chattels, rights and credits of the said Samuel P. Hudson, has been served with a notice of the pendency of said petition by his acceptance, waiver, etc.; that Della F. Van Hagan, wife of Hiram W. Van Hagan; Frances M. Hudson, James B. Hudson, Harriet A. Hudson, and Gertrude E. Hudson are children and heirs of said Samuel P. Hudson, deceased, and all of whom are minors, under the age of twenty-one years; and it further appearing that on order of said court, made on the 12th day of January, 1866, L. W. Cannon was duly appointed the guardian *ad litem* for said minor children, and that he accepted said appointment, and also accepted notice and waived copy, etc., of said petition; and it further appearing that the said Kezia A. Hudson is in possession of said lands, and the said James F. Grant, administrator as aforesaid, having failed to appear and contest the prayer of said petition, *but* the said L. W. Cannon, as the guardian as aforesaid, appears in court and denies each and all the allegations of said petition and requires proof of the same. The court, therefore, proceeding to hear the proof in support of the said petition, and after due consideration of the facts of the same, and it appearing to the satisfaction of the court that the said Kezia A. Hudson is entitled to dower in the above-described lands:

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It is therefore ordered and decreed that one-third part of the said lands above described be set apart and decreed to be the dower of the said Kezia A. Hudson in the aforesaid lands of her said husband. It is further ordered that a writ of admeasurement of dower issue to the sheriff of said county commanding him to summon five discreet freeholders as commissioners, who shall be connected with the parties neither by blood -or marriage and entirely disinterested, who shall, upon oath, allot and set off by metes and bounds to the said Kezia A. Hudson one-third part of the before-described premises, having regard to the improvements and quality of the land as well as the quantity of the dower, and that the action of the said commissioners, with the return of the said sheriff, be made to this court on or before the 15th day of February, 1866.

A. WOODS,
Judge of Probate.

THE STATE OF ALABAMA, }
Calhoun County. }

A. Woods, judge of probate of said county, to any sheriff of said county:

You are hereby commanded to summon five discreet persons, freeholders of your county, connected with the parties neither by blood nor marriage and entirely disinterested, who, being first duly sworn for that purpose, are hereby authorized and required fairly, justly, and impartially, according to the best of their judgment, to mete out, allot, and set off by metes and bounds, having regard to the improvements and quality of the land as well as the quantity of the dower, to Kezia A. Hudson, widow of S. P. Hudson, late of said county, deceased, as her dower one-third part of certain tracts or parcels of land lying and situate in the

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county of Calhoun and known as the N. W. ¼ of sec. 16, W. ½ of N. W. ¼ and S. W. ¼ of N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of sec. 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 20, and the S. ½ of sec. 29, and S. ½ of N. E. ¼ of said sec. 29; also N. W. ¼ of sec. 30, and S. W. ¼ of N. E. ¼ of said section 30, and E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of sec. 30, and S. W. ¼ of S. W. ¼ of sec. 30; also N. E. ¼ of sec. 31, and W. ½ of S. E. ¼ of sec. 31, and also N. E. ¼ of S. E. ¼ of sec. 31; also W. ½ of N. W. ¼ of sec. 32, N. ½ of N. E. ¼ sec. 32, N. E. ¼ S. W. ¼ sec. 32, all in township 15, range eight east, in the Coosa land district, and lying and being in said county of Calhoun and known as the Steam Mill lands, whereof the said S. P. Hudson, during his intermarriage with the said Kezia A. Hudson, was seized and possessed, and after having allotted and set off to the said Kezia A. Hudson her dower in the same they are required to report their proceedings to this court on the fifth day of March next, when and where you are required to have this precept with return of what is done under or by virtue thereof.

This 2nd day of February, A. D. 1866.

A. WOODS,
Judge of Probate.

In pursuance of the power and authority vested in me by the within writ, I have summoned John A. Findlay, Z. Leatherwood, George W. Humphries, Green B. Skelton, and Alfred Wight to allot and set off the dower of the within Kezia A. Hudson, who, being duly sworn by me, have proceeded to perform the duty required of them, as shown in the annexed return.

This 7th day of February, 1866.

J. M. ANDERSON, *Sheriff.*

30 In the Matter of KEZIA A. HUDSON, Petition for Dower.

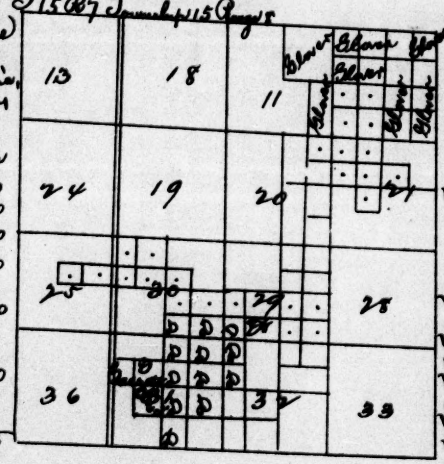
To the Hon. A. Woods, judge of probate for Calhoun county:

In pursuance of the within writ and under authority vested in us, the undersigned commissioners certify to said court that, being first duly sworn, we did go to and upon the tracts of land within mentioned, which, upon a resurvey, was found to contain eighteen hundred and forty (1,840) acres, and, respect being had by us to the improvements and quality of land as well as the quantity of the dower, we did allot and set off to the said Kezia A. Hudson four hundred and eighty (480), more or less, acres of land, bounded as follows—that is to say: Beginning at the N. E. corner of the S. W. ¼ of the S. W. ¼, thence south ¾ of a mile to the S. E. corner of the S. W. ¼ of the N. W. ¼, sec. 32; thence west to the section line, thence south one-quarter (¼) of a mile, thence west ¼ mile, thence south ¼ to the section line of section 31; thence north 1¼ miles to the N. W. corner of the S. W. ¼ of S. E. ¼ of section 30; thence east ¾ mile to the beginning, being the N. E. ¼; also N. ½ of S. E. ¼; also S. W. ¼ of S. E. ¼, two hundred and eighty (280) acres, in section 31; also the W. ½ of N. W. ¼, section 32, eighty (80) acres; also the S. W. ¼ of S. W. ¼, section 29, forty (40) acres; also the S.

S. P. Hudson. Deceased. Estate.

Nos of Power Lands assigned to Mrs Kezia A Hudson (at Blue Mountain, Calhoun County, State of Alabama, on the Seventh day of February 1866 viz:-

	acres
N.E.1/4	160
N.1/2 S.E.1/4	80
S.W.1/4 S.E.1/4 of Section 31	40
also W.1/2 N.W.1/4 of Section 32	80
also S.W.1/4 S.W.1/4 of Section 29 also	40
S.1/2 S.E.1/4 of Sec 30	80
Containing acres	480



Nos of Hudson Estate Lands, at Blue Mountain (County of Calhoun State of Alabama) viz:

SW 1/4	160	
Sec 16 NW 1/4	160	
SW 1/4 NE 1/4	40	
NE 1/4 SW 1/4 of Sec 21, also	40	240
NE 1/4 NE 1/4	40	
E 1/2 SE 1/4 of Sec 20 also	80	120
E 1/2	320	
E 1/2 SW 1/4	80	
NW 1/4 SW 1/4 of Sec 29	40	440
NW 1/4	160	
SW 1/4 NE 1/4	40	
N 1/2 SE 1/4 of Sec 30 also	80	280
N 1/2 NE 1/4	80	
NE 1/4 SW 1/4 of Sec 31	40	120
		1360

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Garrett Lands

S 1/2 NE 1/4	80	
NE 1/4 SW 1/4	40	120
Sec 31 all the above described lands are in T 15 R 7.		

Curd Lands

S 1/2 NE 1/4 of Sec 25 T 15 R 7	40	1360

½ of S. E. ¼, section 30, eighty (80) acres—twelve forties, containing four hundred and eighty (480) acres of land, more or less, all of which we allot and set off to the said Kezia A. Hudson for her dower or third part of the within-described tracts of land, and of which we have put her in possession.

31 In witness whereof we have hereunto set our hands this 7th day of February, 1866.

JOHN A. FINDLY.
Z. LEATHERWOOD.
GEO. W. HUMPHRIES.
GREEN B. SKELTON.
ALFRED WIGHT.

Filed in office February 9th, 1866, and recorded Sept. 14th, 1866.

A. WOODS,
Judge of Probate.

(Here follows diagram marked p. 31.)

32 THE STATE OF ALABAMA, }
Calhoun County. }

I certify that I have surveyed off Mrs. Kezia A. Hudson's dower of the Blue Mountain tracts, at Blue Mountain, Calhoun county, State of Alabama, beginning at the N. E. corner of the S. W. ¼ of S. W. ¼ of sec. 29, thence south ¾ mile, thence west ¼ mile, thence south ¼ mile, thence west ¼ mile, thence south ¼ mile to section line 31; thence west ¼ mile, thence north 1¼ miles, thence east ¾ mile to the beginning, 5 degrees bearing of the needle, containing four hundred and eighty (480) acres—numbers in the margin.

Blue Mountain, Ala., (7th) seventh day of February, A. D. 1866.

W. E. AMARINE,
County Surveyor.

Fee, $10.00.

Chain-carriers: Hiram Sides, Wm. Ford—each two (2) days, $2.00, $1.00.

Recorded September 14th, 1866.

A. WOODS,
Judge of Probate.

33 Court of Probate for Calhoun County, Alabama.

FEBRUARY THE 9TH, A. D. 1866.

In the Matter of the Dower of KEZIA A. HUDSON, Widow of Samuel P. Hudson, Deceased.

Afterwards, on, to wit, the 9th day of February, 1866, came here into court John A. Findley, Z. Leatherwood, George W. Humphries, Green B. Skelton, and Alfred Wight, commissioners duly summoned by the sheriff of said county under order of this court to

allot and set off dower to the said Kezia A. Hudson, widow of the said Samuel P. Hudson, deceased, under a writ issued from this court as well as the said sheriff, by whose return, certified to this court, it appears that the said John A. Findley, Z. Leatherwood, George W. Humphries, Green B. Skelton, and Alfred Wight, commissioners as aforesaid, have allotted and set off to the said Kezia A. Hudson, widow of the said Samuel P. Hudson, as her dower or third part of said lands and tenements mentioned in her petition for dower now on file in this office, all that portion of the N. E. ¼, also N. ½ of S. E. ¼, also S. W. ¼ of S. E. ¼, in sec. 31 (thirty-one); also W. ½ of N. W. ¼, sec. 32; also the S. W. ¼ of S. W. ¼, sec. 29, and also the S. ½ of the S. E. ¼, sec. 30, being twelve forties, containing four hundred and eighty (480) acres, more or less, all in township 15 and range 8, as shown by the county surveyor's plat, and situated in said county of Calhoun; therefore it is ordered, adjudged, and decreed that the certificate and return of said sheriff and commissioners be filed and recorded, and that the allotment made by the said John A. Findley, Z. Leatherwood, George W. Humphries, Green B. Skelton, and Alfred Wight of the dower and premises to the said Kezia A. Hudson, widow as aforesaid, be final and conclusive between the said Kezia A. Hudson and the children and heirs of the said Samuel P. Hudson, deceased, for and during the natural life of the said Kezia A. Hudson.

A. WOODS,
Judge of Probate.

34 THE STATE OF ALABAMA, }
Calhoun County. }

I, Emmett F. Crook, judge of the probate court in and for said county, do hereby certify that the foregoing pages from one (1) to sixteen (16), both inclusive, is a true and literal exemplification of the records of all petitions, reports, notices, writs, returns, orders, and decrees pertaining to the allotment of dower in the lands of Samuel P. Hudson, deceased, to his widow, Kezia A. Hudson, as shown by the records of this office. The word sixteen, as it appears in this certificate, was changed from fifteen before signing.

This August 15th, 1889.

EMMETT F. CROOK,
Judge of Probate of Calhoun County, Alabama.

35 The foregoing being all the plaintiffs' evidence and the only agreement as to the facts shown by the plaintiffs' evidence, the defendants introduced in evidence, without objection, that part of agreement of counsel, in writing, as to facts shown by defendants' evidence, which is in the following words and figures, to wit:

Defendants' Evidence.

1. It is agreed in each of the above-stated causes that the defendants' evidence will show that Samuel P. Hudson died in 1863 seized and possessed of the land sued for in said cause, and that he was the common source of title.

2. That prior to 1866 James F. Grant was the regularly appointed administrator of the estate of Samuel P. Hudson by the probate court of Calhoun county and took possession of the lands in controversy, together with other lands belonging to said estate, as such administrator; that the records of the appointment of said Grant as administrator, together with all the other records of said probate court prior to 1865, were burned by the Federal troops, but the records of the said court since that time have not been burned.

3. It is agreed that the defendants may offer in evidence all the records or any part thereof of the probate court of Calhoun county, Alabama, having reference to the estate or administration thereof of Samuel P. Hudson, deceased, and of the sale of the lands belonging to said estate. A certified transcript of such records may be offered in evidence by the defendants, but the plaintiffs reserve the right to object to the legality of the records as evidence or as showing a divestiture of their title, but no objection will be made because of any informality in the certificate or because the originals are not produced. The plaintiffs also have the right to offer any part of such records upon the same terms above stated.

36 4. That on the 20th day of March, 1866, James F. Grant, the administrator of Samuel P. Hudson, deceased, under an order of the probate court for the sale of the lands of said estate, after advertising the time, terms, and place of sale as required by said order, proceeded to sell the reversionary interest of the heirs of Samuel P. Hudson in and to the said lands in controversy at public outcry on the premises, together with other lands of the said estate, subject to the widow's dower, and at said sale Kezia A. Hudson, widow of the said Samuel P. Hudson, deceased, purchased the said reversionary interest in and to the said lands in controversy in this suit, as set forth in the report of said sale, for the sum of four hundred and fifty ($450.00) dollars, which amount she paid the administrator in cash, but the plaintiffs reserve the right to object to the validity of such sale as affecting their rights and as evidence showing a divestiture of their title.

5. That the defendants may offer in evidence the deed made and delivered by the administrator, James F. Grant, to Kezia A. Hudson, but plaintiffs reserve the right to object to the validity of said deed to divest their title or as being authorized by any valid order of the court.

6. That the said Kezia A. Hudson held possession of the land in controversy from the date of said sale by said administrator, claiming to hold the same under said purchase and conveyance of said lands by said administrator and in her own right till she sold the same to Sherman & Boynton in the spring of 1869, when she surrendered possession to them, and afterwards, on the 28th day of October, 1869, made a deed of conveyance to them in the usual form of such conveyances to said property; that Sherman & Boynton went into possession of the lands in controversy on the day of their purchase and continued in possession, holding and claiming the same as their own, until they sold the same to H. L. Jeffers, De-

cember 10th, 1872, who went into possession and held in a
37 like manner until he sold and conveyed the same to The Woodstock Iron Company, one of the defendants, June 24th, 1874; that said Woodstock Iron Company went into possession thereof on the day of purchase as aforesaid, holding and claiming the same in a like manner until the present time, except as to the lands in the corporate limits of Anniston, which said land was sold and conveyed by the said Woodstock Iron Company to the Anniston Land & Improvement Company, May 22nd, 1884, and by this company sold and conveyed to the Anniston City Land Company on the eighth day of June, 1887. The Anniston Land & Improvement Company went into possession of said land under its purchase, claiming to own the same in a like manner above stated, and so the Anniston City Land Company after its purchase; that the several deeds above recited from Mrs. Hudson to Sherman & Boynton, from Sherman & Boynton to Jeffers, and from Jeffers to the Woodstock Iron Company, and the Woodstock Iron Company to the Anniston Land & Improvement Company, and Anniston Land & Improvement Company to the Anniston City Land Company are in the usual form of warranty deeds in fee simple and were duly recorded.

7. That the administrator, James F. Grant, and the probate judge, Alexander Woods, who was the probate judge during the administration of the estate of Sam'l P. Hudson, are both dead; that said Grant died in 1878 and said Woods died in 1887.

8. That the lands in controversy are within and adjoining the corporate limits of the city of Anniston and are near to or adjoining lands on which defendants have expended large sums of money, amounting to several hundred thousand dollars, which improvements and expenditures of monies have greatly enhanced the value of the lands in suit; and a number of other parties have spent large sums of money on adjoining lands in the city of Anniston and made permanent improvements thereon which have aided
38 materially in enhancing the value of the lands in controversy; that defendants have laid out the city of Anniston and were original owners of most of the land upon which said city is built, but no public or permanent improvements have been made on the Hudson lands except the building of a street-car line on a portion of the same, which is on a portion of the ten-acre tract.

The defendant next offered a certified copy of the records of the probate court of Calhoun county, Alabama, in regard to a sale of the lands of Samuel P. Hudson, deceased, which is in the following words and figures, to wit:

To the Hon. A. Woods, judge of the probate court of Calhoun county, Alabama:

Your petitioner, James F. Grant, administrator of all and singular the goods and chattels of the estate of Samuel P. Hudson, deceased, most respectfully states that his intestate died possessed and the owner of real estate situated in the county of Calhoun, town lots, to wit, Lot No. 21, in the old plan of the town of Jacksonville, containing twenty-five (25) acres, except two (2) acres sold of- the

west side of said lot for a graveyard; lot lying between the Brooks lot and Fain lot, on Main street, containing twenty-one and three and ¼ acres; also the following lands, to wit, the S. E. ¼ of the S. E. ¼ of section 30, the N. ½ of the N. E. ¼ of sec. 32, the W. ½ of S. W. ¼ of sec. 29, the W. ½ of N. W. ¼ of sec. 21, the S. W. ¼ of N. E. ¼ of sec. 21, the N. E. ¼ of N. E. ¼ of sec. 20, the E. ½ of S. E. ¼ of sec. 20, the E. ½ of S. W. one-fourth of 29, the S. ½ of N. E. ¼ of sec. 29, the S. W. ¼ of S. E. ¼ of sec. 30, the W. ½ of S. E. ¼ of sec. 29, the E. ½ of S. E. ¼ of sec. 29, the N. E. ¼ of S. E. ¼ of sec. 31, the S. E. ¼ of N. E. ¼ of sec. 31, the N. E. ¼ of S. E. ¼ of sec. 30, the S. W. ¼ of N. E. ¼ of sec. 30, the N. W. ¼ of sec. 30, the N. E. ¼ of S. W. ¼ of sec. 21, the N. W. ¼ of sec. 16, the S. W. ¼ of S. W. ¼ of sec. 30, the S. W. ¼ of N. W. ¼ of sec. 32, the W. ½ of N. E. ¼ of sec. 31, the N. E. ¼ of S. W. ¼ of sec 32, all in township 15, range 8 east; also the Maddux place, to wit, W. ½ of S. E. ¼, the W. ½ of N. E. ¼, and the N. E. ¼ of N. E. ¼ of sec. 31,
39 and the N. W. ¼ of N. W. ¼ of sec. 32, T. 15, range 8 east; also E. ½ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ and the E. ½ of the N. W. ¼ of the N. W. ¼ of sec. 25, twenty-five, township 14, range 8, containing one hundred and forty (140) acres, known as the Nunnelly place; also lot in the town of Jacksonville known as the Walnut-tree lot, lying east of Main street and extending from street leading from Main street to the graveyard and extending to the branch, containing twelve (12) acres, more or less; also the S. ½ of the N. E. ¼ and N. E. ¼ of S. W. ¼ of sec. 31, T. 15, R. 8, and S. ½ of N. E. ¼, sec. 25, T. 15, R. 7. Your petitioner avers that the personal property of said estate is insufficient to pay the debts of said estate, and that in order to pay the debts it is necessary to sell the said real estate. He therefore asks that your honor set a day for hearing and determining this his application; that notice of the same be given by publication in the Jacksonville Republican, a newspaper published in said county, for three successive weeks prior to said day. The said Samuel P. Hudson left as his heirs-at-law and distributees of his estate the following-named persons, to wit, Kizia A. Hudson, widow of deceased and over twenty-one years of age; Dela F. Van Hagan, wife of Hiram W. Van Hagan, said husband of full age; Francis M. Hudson, James Hudson, Harriet A. Hudson, and Gertrude E. Hudson, the last four being minors under twenty-one years of age, and all reside in Calhoun county. He asks that said heirs and distributees be made parties, and that citations be issued to them, and that a guardian *ad litem* be appointed *be appointed* to represent the minors, and on final hearing your honor grant him an order to sell said real estate to the highest bidder on a credit of one and two years, with inter-
40 est from date of sale, subject, however, to the widow's right of dower in said real estate, except as to lot 21 and the two-acres lot on Main street; and, as in duty bound, he will ever pray, etc., etc.

ELLIS & CALDWELL,
Attorneys for Plaintiff.

THE STATE OF ALABAMA, }
Calhoun County. }

Before me, A. Woods, judge of the probate court of Calhoun county, personally came James F. Grant, adm'r of the estate of Samuel P. Hudson, deceased, who, being duly sworn, says that the facts set forth in the foregoing application are true to the best of his knowledge and belief.

J. F. GRANT.

Sworn to and subscribed before me this the 9th day of January, 1866.

A. WOODS,
Judge of Probate.

Filed in office January 9th, 1866, and recorded September 6th, 1866.

41 Court of Probate for Calhoun County, Alabama.

JANUARY 9TH, A. D. 1866.

This day came James F. Grant, administrator of the estate of S. P. Hudson, deceased, and presents his petition, in writing, representing, among other things, that the intestate died possessed and was the owner of real estate situated in said county of Calhoun and town lots in the town of Jacksonville, Alabama, to wit: Lot No. 21, with old plan of said town, containing twenty-five acres, except two acres sold off of the west side of said lot for a graveyard; also a lot lying between the Brooks lot and Fain lot on Main street, containing between one and three and a quarter acres; also the following land, to wit, the S. E. ¼ of the S. E. ¼ of sec. 30, the N. ½ of N. E. ¼ of sec. 32, the W. ½ of S. W. ¼ of sec. 29, the W. ½ of N. W. ¼ of sec. 21, the S. W. ¼ of N. E. ¼ of sec. 21, the N. E. ¼ of N. E. ¼ of sec. 20, the E. ½ of S. E. ¼ of sec. 20, the E. ½ of S. W. ¼ of sec. 29, the S. ½ of N. E. ¼ of sec. 29, the S. W. ¼ of S. E. ¼ of sec. 30, the W. ½ of S. E. ¼ of sec. 29, the E. ½ of S. E. ¼ of sec. 29, the N. E. ¼ of S. E. ¼ of sec. 31, the S. E. ¼ of N. E. ¼ of sec. 31, the N. E. ¼ of S. E. ¼ of sec. 30, the S. W. ¼ of N. E. ¼ of sec. 30, the N. W. ¼ of sec. 30, the N. E. ¼ of S. W. ¼ of sec. 21, the N. W. ¼ of sec. 16, the S. W. ¼ of S. W. ¼ of sec. 30, the S. W. ¼ of N. W. ¼ of sec. 32, the W. ½ of N. E. ¼ of sec. 31, the N. E. ¼ of S. W. ¼ of sec. 32, all in township 15, range 8 east; also the Maddux place, to wit, W. ½ of S. E. ¼, the W. ½ of N. E. ¼, and the N. E. ¼ of N. E. ¼ of sec. 31, and the N. W. ¼ of N. W. ¼ of sec. 32, T. 15, range 8 east. Petitioner avers that personal property of said estate is insufficient to pay the debts of said intestate, and in order to pay the debts it is necessary to sell the above-described lot and lands; also it is necessary to sell the following-described lands for the purposes above stated, to wit, the E. ½ of N. W. ¼, the N. W. ¼ of N. E. ¼, and E. ½ of N. W. ¼ of N. W. ¼ of sec. 25, township 14, range 8, contain-

ing one hundred and forty (140) acres, known as the Nun-
42 nelly place; also lot in the town of Jacksonville, Alabama, known as the Walnut-tree lot, lying east of Main street and extending from street leading from Main street to the graveyard and extending to the branch, containing twelve acres, more or less. Said administrator further states that the heirs and distributees of said estate are Kizia A. Hudson, widow of deceased, over twenty-one years of age; Della F. Van Hagan, wife of Hiram W. Van Hagan, who is of full age; Francis M. Hudson, James Hudson, Harriet A. Hudson, and Gertrude E. Hudson—the last four named are under twenty-one years of age and all reside in said county of Calhoun.

The premises considered, it is ordered by the court that the 15th day of February, 1866, be set for the hearing of said petition, and that notice therefore be given by publication in the Jacksonville Republican, a newspaper printed and published in said county, for three successive weeks prior to said day, as a notice to all persons concerned to be and appear at a special term of said court to be held at the court-house of said county on said 15th day of February, 1866, and defend against said petition if they think proper, and that similar notice issue, to be served upon said heirs, who are all of full age, at least ten days prior to the day set for the hearing of said petition.

It is further ordered that L. W. Cannon be, and he is hereby, appointed guardian *ad litem* for the aforesaid minor heirs of said estate.

A. WOODS,
Judge of Probate.

Court of Probate for Calhoun County, Alabama.

JANUARY 9TH, A. D. 1866.

This day came Kizia A. Hudson, widow of Samuel P. Hudson, deceased, and filed her consent that her dower interest in the following described town lots in the town of Jacksonville, Alabama, belonging to said deceased'- estate be sold and she receive an equivalent in money, as provided by statute. It is ordered that said consent be recorded and filed in office.

A. WOODS,
Judge of Probate.

43 THE STATE OF ALABAMA, }
Calhoun County. }

Court of Probate for Calhoun County, Alabama, Special Term.

JANUARY 12TH, 1866.

Before me, A. Woods, judge of the probate court of said county.

To any sheriff of the State of Alabama:

You are hereby required to summon Kizia A. Hudson, who is of full age; Adella F. Van Hagan, wife of H. W. Van Hagan, the said H. W. Van Hagan of full age; Francis M. Hudson and James B.

Hudson, the two last named under fourteen and under twenty-one years of age, heirs, etc., of S. P. Hudson, late of said county, deceased, to appear before the said A. Woods, judge of the said court, at a special term thereof to be holden at the court-house of said county on the 15th day of February next, then and there to answer the petition of J. F. Grant, administrator of the estate of the said S. P. Hudson, deceased, setting forth that said decedent died seized and possessed of certain lands situate in Calhoun county, and praying this court to grant an order for the sale of the same for the purpose of paying the debts of said deceased. Said lands are described in said petition as follows, to wit: The S. E. ¼ of S. E. ¼, sec. 30; the N. ½ of N. E. ¼, sec. 32; the W. ½ of S. W. ¼, sec. 29; the W. ½ of N. W. ¼ of sec. 21, the S. W. ¼ of N. E. ¼ of sec. 21, the N. E. ¼ of N. E. ¼, sec. 20; the E. ½ of S. E. ¼ of sec. 20, the E. ½ of S. W. ¼ of sec. 29, the S. ½ of N. E. ¼ of sec. 29, the S. W. ¼ of S. E. ¼ of sec. 30, the W. ½ of S. E. ¼ of sec. 29, the E. ½ of S. E. ¼ of sec. 29, the N. E. ¼ of S. E. ¼, sec. 31; the S. E. ¼ of N. E. ¼, sec. 31; the N. E. ¼ of S. E. ¼ of sec. 30, the S. W. ¼ of N. E. ¼, sec. 30; the N. W. ¼ of sec. 30, the N. E. ¼ of S. W. ¼ of sec. 21, the N. W. ¼ of sec. 16, the S. W. ¼ of S. W. ¼ of sec. 30, the S. W. ¼ of N. W. ¼ of sec. 32, the W. ½ of N. E. ¼ of sec. 31, the N. E. ¼ of S. W. ¼ of sec. 32, all
44 in township 15, range 8 E.; also the Maddux place, to wit, W. ½ of S. E. ¼, the W. ½ of N. E. ¼, and the N. E. ¼ of the N. E. ¼ of sec. 31, and the N. W. ¼ of the N. W. ¼, sec. 32, township 15, R. 8 east.

Herein fail not, and have you then and there this precept with your return.

Witness A. Woods, judge of said court, at office, this 12th day of January, A. D. 1866.

A. WOODS,
Judge of Probate.

Recorded September 6, A. D. 1866.

A. WOODS,
Judge of Probate.

JAMES F. GRANT,
Administrator of the Estate of S. P. Hudson, Deceased.

In the Probate Court for Calhoun County.

I, L. W. Cannon, a citizen of said county, consent to act as guardian *ad litem* for Francis M. Hudson, James Hudson, Harriet A. Hudson, and Gertrude E. Hudson, minor defendants in a cause now pending in the probate court of Calhoun county, upon an application to sell the lands of S. P. Hudson, deceased.

Given under my hand this the 12th day of January, 1866.

L. W. CANNON,
Guardian ad Litem.

Recorded September 7th, 1866.

A. WOODS,
Judge of Probate.

In the Probate Court of Calhoun County.

In the Matter of the Estate of SAMUEL P. HUDSON, Deceased.

Interrogatories to be propounded to Larkin W. Cannon and Gabriel B. Douthit, of said county, the answer- to which, when taken, are to be used in evidence before said court on the hearing of and in behalf of an application made by James F. Grant, administrator of said estate, to sell land belonging to said estate.

Interrogatory 1st. Are you or either of your acquainted with the following-described lands and as belonging to said estate, to wit, lot No. 21, in old plan of the town of Jacksonville, containing twenty-five (25) acres, except two (2) acres sold off the west
45 side of said lot for a graveyard; lot lying between the Brooks and Fain lot on Main street, containing one and ¾ acres; also the S. E. ¼ of the S. E. ¼ of sec. 30, N. ½ of N. E. ¼ of sec. 32, S. W. ¼ of S. W. ¼ of sec. 29, W. ½ of N. W. ¼ sec. 21, S. W. ¼ of N. E. ¼ sec. 21, N. E. ¼ of N. E. ¼ sec. 20, E. ½ of S. E. ¼ of sec. 20, E. ½ of S. W. ¼ of sec. 29, S. ½ of N. E. ¼ of sec. 29, S. W. ¼ of S. E. ¼ of sec. 30, W. ½ of S. E. ¼ sec. 29, E. ½ of S. E. ¼ sec. 29, N. E. ¼ of S. E. ¼ sec. 31, S. E. ¼ of N. E. ¼ sec. 31, N. E. ¼ of S. E. ¼ sec. 30, S. W. ¼ of N. E. ¼ sec. 30, N. W. ¼ sec. 30, N. E. ¼ of S. W. ¼ sec. 21, N. W. ¼ sec. 16, S. W. ¼ S. W. ¼ sec. 30, S. W. ¼ of N. W. ¼ sec. 32, W. ½ of N. E. ¼ sec. 31, N. E. ¼ of S. W. ¼ sec. 32, all lying in township 15, range 8 east; also the Maddux place, to wit, W. ½ of S. E. ¼, W. ½ of N. E. ¼, and N. E. ¼ of N. E. ¼ of sec. 21, and the N. W. ¼ of the N. W. ¼ sec. 32, township 15, range 8 east; also E. ½ of N. W. ¼, the N. W. ¼ of N. E. ¼, and E. ½ of N. W. ¼ of N. W. ¼ of sec. 25, township 14, range 8 east, containing about one hundred and forty (140) acres, known — the Nunelly place; also lot in the town of Jacksonville known as the Walnut-tree lot, east of Main street and extending from Main street to the graveyard, and from the street leading from Main street to the graveyard, extending to the branch, containing twelve acres, more or less; also the S. ½ of N. E. ¼ of S. W. ¼ sec. 31, T. 15, R. 8, and S. ½ of N. E. ¼ sec. 25, T. 15, R. 7?

Interrogatory second. Are you or either of you acquainted with the heirs and distributees of said estate? If you please, state the names and of whom are under the age of twenty-one years, and whom are married, woen and to whom married, and, if any, who are of unsound mind, and if they and they alone are the heirs and distributees of said estate, and also state the residences of each.

Interrogatory third. Is the personal property of said estate sufficient to pay the debts thereof?

46 Interrogatory fourth. Please state anything else in behalf of the application that you or either of you know.

ELLIS & CALDWELL,
Attorneys for Administrator.

Filed in office February 9th, 1866.
Recorded December 13th, 1866.

A. WOODS,
Judge of Probate.

STATE OF ALABAMA, }
Calhoun County. }

To Leroy F. Box and George I. Turnley:

Know ye that we, having full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize you to call before you and examine Larkin W. Cannon and Gabriel B. Douthit as witnesses in a cause pending in the probate court of Calhoun county, wherein James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, makes application to sell real estate belonging to said estate, on oath to be by you administered, upon interrogatories annexed to this commission; to take and certify the deposition of the witness and return the same to our said court, to be holden on the 15th day of February, 1866, under your hands.

Witness A. Woods, judge of said court, at office, this 9th day of February, A. D. one thousand eight hundred and sixty-six, and of American Independence the year —.

A. WOODS,
Judge of Probate.

Issued the 9th day of February, 1866.
Recorded December 13th, 1866.

A. WOODS,
Judge of Probate.

Depositions of L. W. Cannon and G. B. Douthit, sworn and examined the 10th day of February, A. D. 1866, at Jacksonville, Alabama, under and by virtue of a commission issued out of the probate court of Calhoun county, Alabama, in the matter of the estate of Samuel P. Hudson, deceased, on application of J. F. Grant to sell land.

47 *Separate Answers of L. W. Cannon.*

In answer to the first interrogatory he says: He is acquainted with the lots and lands, but not as described by the numbers.

In answer to the second interrogatory he says: He says he is acquainted with them all: Kizia A. Hudson, widow of the deceased and over 21 years of age; Adella F. Van Hagan, wife of Hiram W. Van Hagan, said husband, over 21 years of age; Francis M. Hudson, under 21; Harriet A. Hudson, under 21, and Gertrude E. Hudson. They all reside in Calhoun county, Alabama. None are of unsound mind, and they and they alone are the heirs and distributees of said estate.

To interrogatory third he says: To the best information and belief the personal property is not sufficient to pay the debts.

To interrogatory fourth he says: He knows nothing further that would benefit the applicant.

L. W. CANNON.

Separate Answer of G. B. Douthit.

In answer to the first interrogatory he says: He is not acquainted with the lands described by the numbers, but knows some lands said to belong to said estate.

To the second interrogatory he says: He is not acquainted with the heirs and distributees; has heard the name of one daughter, who married Mr. Van Hagan; think her name is Adella; does not know names of others.

To the third interrogatory he says: To the best of his information and belief the personal property of said estate is not sufficient to pay the debts thereof.

To the fourth interrogatory he says: He knows nothing further that would benefit the applicant.

G. B. DOUTHIT.

48 Examination of L. W. Cannon and G. B. Douthit, witnesses in the above-stated matter of the estate of Samuel P. Hudson, deceased, on application of J. F. Grant, administrator, to sell land, who are personally known to me, — were, between the hours of 9 a. m. and 12 m. on the 10th day of February, 1866, at Jacksonville, Alabama, called before the undersigned commissioners, and, after being sworn to speak the truth, the whole truth, and nothing but the truth, did depose and testify as above shown and stated, which was taken, reduced to writing, and signed by said witnesses in my presence, all of which I certify under my hand this the 10th day of February, A. D. 1866.

LEROY F. BOX,
Commissioner.

Bill of Cost.

To L. W. Cannon, attendance as witness	$1 50
To G. B. Douthit, attendance as witness	1 50
To commissioner for execution of commission and certificate	2 00
Total	$5 00

I certify that the above cost bill is a true statement of the expense and fees which accrued in executing the accompanying commission.

LEROY F. BOX,
Commissioner.

February 10, 1866.

Recorded December 4th, 1866.

A. WOODS,
Judge of Probate.

To the Hon. Alexander Woods, judge of the probate court of the county of Calhoun, State of Alabama:

Your petitioner, Kizia A. Hudson, a citizen of the county of Calhoun and State of Alabama, over the age of twenty-one years, respectfully represents that she is the widow of Samuel P. Hudson,

deceased, late of said county; that she was married to the said Samuel P. Hudson in the State of South Carolina in the year 1844; that her said husband, Samuel P. Hudson, departed this life in August, A. D. 1863, in the said county of Calhoun; that at the time of his death, and many years previous thereto, he resided in the
49 said county of Calhoun and was residing upon the lands hereinafter mentioned; that her said husband died seized and possessed of the following lands, to wit: N. W. ¼ of sec. 16, W. ½ of N. W. ¼ and S. W. ¼ of N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of sec. 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 20, and the south half of section 29, and the S. ½ of N. E. ¼ of said section 29; also the N. W. ¼ of section 30 and the S. W. ¼ of N. E. ¼ of said section 30, and the E. ½ of S. E. ¼ and the S. W. ¼ of S. E. ¼ of sec. 30, and the S. W. ¼ of the S. W. ¼ of sec. 30; also the N. E. ¼ of sec. 31, and the W. ½ of S. E. ¼ of sec. 31, and also the N. E. ¼ of S. E. ¼ of section 31; also the W. ½ of N. W. ¼ of sec. 32, and the N. ½ of the N. E. ¼ of sec. 32, and the N. E. ¼ of S. W. ¼ of sec. 32; all in township 15, R. 8 east, in the Coosa land district, and lying and being in said county of Calhoun and known as the steam-mill lands, between Oxford and Jacksonville; that at the time of the death of her said husband, Samuel P. Hudson, he resided and lived upon said land and was seized and possessed of the same, and your petititioner has since then and at this time lives upon said lands.

Your petitioner further states that the said husband departed this life, leaving the following heirs-at-law, viz., your petitioner, the widow of said Hudson, and the following children, to wit, Della F. Van Hagan, wife of Hiram W. Van Hagan; Francis M. Hudson, James B. Hudson, all of whom are over the age of fourteen years, but under twenty-one, except Hiram W. Van Hagan, who is over twenty-one, all reside with your petitioner in said county of Calhoun; also Harriet A. Hudson and Gertrude E. Hudson, minors under the age of fourteen, and reside with your petitioner, who is the mother of all of said children. Your petitioner further represents that James F. Grant has been appointed administrator of the goods and estate of said S. P. Hudson, and has qualified and given bond as such administrator, and that said Grant resides in the said county of Calhoun.

The premises considered, your petitioner prays that dower be assigned her, and that your honor will grant an order for the
50 assignment of dower in the lands aforesaid; that your honor will give notice of this your petitioner's application for dower to the said James F. Grant, administrator aforesaid and also to the said Hiram W. Van Hagan and his wife, Della Van Hagan, and to the other children aforesaid of the said Samuel P. Hudson, to wit, Francis M. Hudson, James B. Hudson, Harriet A. and Gertrude E. Hudson; that guardian *ad litem* be appointed for said minor children; that said notice be issued and such orders granted and proceedings be had as is required by the statute in such case made and provided, in order that your petitioner may have her dower assigned her in the lands aforesaid, and decree be made by your honor's court appoint-

ing commissioners, and etc.; and your petitioner, as in duty bound, will ever pray, etc.

KIZIA A. HUDSON, *Petitioner.*
KIZIA A. HUDSON.

Sworn to and subscribed before me this 11th day of January, 1866.

A. WOODS,
Judge of Probate.

We accept notice of the foregoing application, waive notice and copy, etc.

ADELLA F. VAN HAGAN.
H. W. VAN HAGAN.

Filed in office January 11th, 1866, and recorded Sept. 17th, 1866.
A. WOODS,
Judge of Probate, Court of Probate for Calhoun County.

January 11th, 1866.

51 Court of Probate for Calhoun County, Alabama.

JANUARY 11TH, 1866.

This day came into court Kizia A. Hudson, a citizen of said county, and presents and files in court her petition, representing that she is the widow of Samuel P. Hudson, deceased; that she was married to the said Samuel P. Hudson, in the State of South Carolina, in the year 1844; that her said husband, Samuel P. Hudson, departed this life in August, A. D. 1863, in the said county of Calhoun; that at the time of his death and for many years previous thereto said decedent resided in the said county of Calhoun, and was residing upon the lands hereinafter mentioned; that her said husband, Samuel P. Hudson, died seized and possessed of the following-described lands, to wit: The N. W. ¼ of sec. 16, the W. ½ of N. W. ¼ and the S. W. ¼ of the N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of sec. 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 20, and S. ½ of sec. 29, and S. ½ of N. E. ¼ of sec. 29, and N. W. ¼ of sec. 30, and S. W. ¼ of N. E. ¼ of sec. 30, and E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of sec. 30, and S. W. ¼ of S. W. ¼ of sect. 30, and N. E. ¼ sec. 31, and W. ½ of S. E. ¼ of sec. 31, and N. W. ¼ of S. E. ¼ of sec. 31, and W. ½ of N. W. ¼ of sec. 32, and N. ½ of N. E. ¼ of sec. 32, and N. E. ¼ of S. W. ¼ of sec. 32, all in township 15, R. 8 east, in the Coosa land district, lying in said county of Calhoun, and known as the Steam Mill lands, between Oxford and Jacksonville. Petitioner further states that her said husband, S. P. Hudson, at the time of his death resided and lived upon said lands and was seized and possessed of the same, and petitioner has since then and at this time resides upon said lands. Petitioner further states that said decedent left the following heirs, to wit, petitioner, his widow, and the following children, to wit, Della F. Van Hagan, wife of Hiram W. Van Hagan; Francis M.

Hudson, James B. Hudson, all of whom are over the age of fourteen and under twenty-one years, except Hiram W. Van Hagan,
52 who is over 21 years of age; also Harriet A. Hudson and Gertrude E. Hudson, minors under the age of fourteen years, and all reside with said petitioner, who is the mother of said children. Petitioner further represents that James F. Grant has been appointed administrator of the estate of said Hudson, deceased, and that said Grant resides in the said county of Calhoun. Petitioner asks that dower be assigned to her out of the lands described as aforesaid. The heirs and distributees are hereby notified that the 26th day of January, 1866, said petition will be heard and determined upon by the court. They therefore can attend at a special term of said court to be holden at the said court-house of the said county on said 26th day of January, 1866, and defend against said petition, if they think proper. It is further ordered that L. W. Cannon be, and he is hereby, appointed guardian *ad litem* for said minor heirs of said estate to protect their interest in the foregoing application.

A. WOODS,
Judge of Probate.

To the Hon. Alexander Woods, judge of the probate court for the county of Calhoun and State of Alabama:

The undersigned, L. W. Cannon, who has been appointed by the honorable the probate court for Calhoun county, Alabama, guardian *ad litem* for the children of S. P. Hudson, deceased, to wit, Francis M. Hudson, Della F. Van Hagan, James B. Hudson, Harriet A. Hudson, and Gertrude E. Hudson, do hereby accept the appointment of guardian *ad litem* to protect the interests of the said minors in the matter of the application of Kizia A. Hudson, widow of S. P. Hudson, for an assignment of dower in and to certain lands set forth in her said petition filed in the probate office of said county on the — day of January, 1866.

Witness my hand this the 12th day of January, 1866.

L. W. CANNON,
Guardian ad Litem.

Filed in office 12th day of January, 1866, and recorded 7th day of January, 1866.

A. WOODS,
Judge of Probate.

53 Court of Probate for Calhoun County, Alabama.

JANUARY 26TH, A. D. 1866.

On this the 26th day of January, A. D. 1866, before the probate court of Calhoun county, Alabama, personally came Kizia A. Hudson, widow of S. P. Hudson, late of said county, deceased, and filed her petition in this court alleging that she is the widow of the said Samuel P. Hudson; that she is entitled to her dower or one-third part of certain tracts or parcels of land lying in the county of Cal-

houn and State of Alabama and known as the N. — ¼ of sec. 16, W. ½ of N. W. ¼ and S. W. ¼ of N. E. ¼ and W. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of sec. 21, and N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 20, and the S. ½ of sec. 29, and the S. ½ of N. E. ¼ of sec. 29; also the N. W. ¼ of sec. 30 and S. W. ¼ of N. E. ¼ of sec. 30, and the E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of sec. 30 and S. W. ¼ of S. W. ¼ of sec. 30; also N. E. ¼ of sec. 31 and W. ½ of S. E. ¼ of sec. 31, and also N. E. ¼ of S. E. ¼ of sec. 31; also the W. ½ of N. W. ¼ of sec. 32 and the N. ½ of N. E. ¼ of sec. 32 and the N. E. ¼ of S. W. ¼ of sec. 32, all in township 15, range 8 east, in the Coosa land district, whereof the said Samuel P. Hudson during their intermarriage was seized and possessed; and it appearing to the satisfaction of the court that J. F. Grant, the administrator of the goods and chattels, rights and credits of the said Samuel P. Hudson, deceased, has been served with a notice of the pendency of said petition by his acceptance, waiver, and etc.; that Della F. Van Hagan, wife of Hiram W. Van Hagan; Francis M. Hudson, James B. Hudson, Harriet A. Hudson, and Gertrude E. Hudson are children and heirs of the said Samuel P. Hudson, deceased, and all of whom are minors, under the age of twenty-one years; and it further appearing that by an order of said court, made on the 12th day of January, 1866, L. W. Cannon was duly appointed guardian *ad litem* for said minor children, and that he accepted said appointment, and also accepted notice
54 and waived copy, etc., of said petition; and it further appearing that said Kizia A. Hudson is in possession of said land, and the said James F. Grant, administrator as aforesaid, having failed to appear and contest the prayer of said petitioner, *but* the said L. W. Cannon, as the guardian *ad litem* as aforesaid, appears in court and denies each and all the allegations of said petition and requires proof of the same. The court, therefore, proceeds to hear the proof in support of said petition, and after due consideration of the facts of the same, and it appearing to the satisfaction of the court that the said Kizia A. Hudson is entitled to dower in the above-described lands:

It is therefore ordered and decreed that one-third part of the said lands above described be set apart and decreed to be the dower of the said Kizia A. Hudson in the aforesaid lands of her said husband. It is further ordered that a writ of admeasurement of dower issue to the sheriff of said county commanding him to summon five discreet freeholders as commissioners, who shall be connected with the parties neither by blood nor marriage and entirely disinterested, who shall, upon oath, allot and set off by metes and bounds to the said Kizia A. Hudson one-third part of the before-described premises, having regard to the improvements and quality of the lands *and* as well as the quantity of the dower, and that the action of the said commissioners, with the return of the said sheriff, be made to this court on or before the fifteenth (15th) day of February, 1866.

A. WOODS,
Judge of Probate.

THE STATE OF ALABAMA, }
Calhoun County. }

A. Woods, judge of the probate court of said county, to the sheriff of said county:

You are hereby commanded to summon five (5) discreet persons, freeholders of your county, connected with the parties neither by blood nor marriage and entirely disinterested, who, being
55 first duly sworn for that purpose, are hereby authorized and required fairly, justly, and impartially, according to the best of their judgment, to mete out, allot, and set off by metes and bounds, having regard to the improvements and quality of the land as well as the quantity of the dower, to Kizia A. Hudson, widow of S. P. Hudson late of said county, deceased, as her dower one-third part of certain tracts or parcels of land lying and situate in the county of Calhoun and known as the N. W. ¼ of sec. 16 and W. ½ of N. W. ¼ and the S. W. ¼ of N. E. ¼ and N. E. ¼ of S. W. ¼ of sec. 21, and the N. E. ¼ of N. E. ¼ and the E. ½ of the S. E. ¼ of sec. 20, and the S. ½ of sec. 29, and the S. ½ of N. E. ¼ of said sec. 29; also the N. W. ¼ of sec. 30, and the S. W. ¼ of N. E. ¼ of said section 30, and the E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of sec. 30, and S. W. ¼ of S. W. ¼ of sec. 30; also N. E. ¼ of sec. 31, and W. ½ of S. E. ¼ of sec. 31, and also N. E. ¼ of S. E. ¼ of sec. 31; also the W. ½ of N. W. ¼ of sec. 32, and the N. ½ of N. E. ¼ of sec. 32, and the N. E. ¼ of S. W. ¼ of sec. 32, all in township 15, range eight east, in the Coosa land district, lying a*b*d being in said county of Calhoun and known as the Steam Mill lands, whereof the said S. P. Hudson, during his intermarriage with the said Kizia A. Hudson, was seized and possessed, and after having allotted and set off to the said Kizia A. Hudson her dower in the same they are required to report their proceedings to this court on the 5th day of March next, where and when you are required to have this precept with return of what is done under or by virtue thereof.

This 2nd day of February, A. D. 1866.

A. WOODS,
Judge of Probate.

In pursuance of the power and authority rested in me by the within writ, I have summoned John A. Findley, Z. Leatherwood, Geo. W. Humphries, Green B. Skelton, and Alfred Wight to allot and set off the dower of the within Kizia A. Hudson, who, being duly sworn by me, have proceeded to perform the duty required of them, as shown in the annexed return.

56 This 7th day of February, 1866.

J. M. ANDERSON, *Sheriff.*

In the Matter of KIZIA A. HUDSON, Petition for Dower.

To the Honorable A. Woods, judge of probate for Calhoun county:

In pursuance of the within writ and under authority vested in us, the undersigned commissioners certify to said court that, being

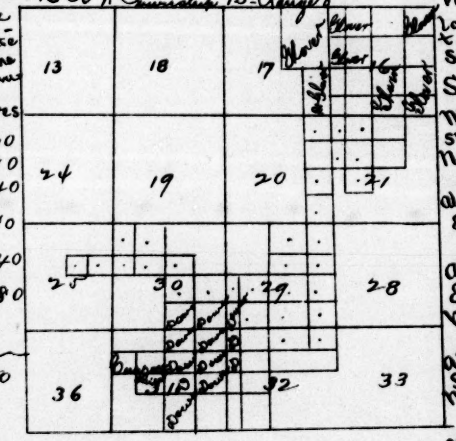
Nos of Power Land assigned to Mrs Rezia A Hudson at Blue mountain Calhoun County, State of Alabama, on the Seventh day of February, 1860.-

viz: acres

NE 1/4	160
N 1/2 SE 1/4	80
SW 1/4 SE 1/4	40
at sec 31	
S 1/2 NW 1/4	80
of Section 32	
Also SW of sec 1/4	40
of Sec 29	
Also S 1/2 SE 1/4	80
of Section 30	

Containing 480 acres

T. 15 R. 7. Township 15 Range 7



Nos of Hudson Estate Lands, on Blue Mountain, County of Calhoun State of Alabama, viz:-

SW 1/4 of Sec 16	160	
NW 1/4	160	
SW 1/4 NE 1/4	40	
NE 1/4 SW 1/4	40	240
of Sec 21		
Also NE 1/4 NE 1/4	40	
E 1/2 SE 1/4	80	120
of Sec 20		
Also E 1/2	320	
E 1/2 SW 1/4	80	
NW 1/4 SW 1/4	40	440
of Sec 29		
Also NW 1/4	160	
SW 1/4 NE 1/4	40	
N 1/2 SE 1/4	80	280
of Sec 30		
N 1/2 NE 1/4	80	
NE SW 1/4	40	120
of Sec 32		1360

Garrett Land

S 1/2 NE 1/4	80	
NE 1/4 SW 1/4	40	120
of sec. 31		

all the above discribed lands in T 15 R. 8

Curl Lands S 1/2 NE 1/4	80
Sec 25 T. 15 R. 7	1560

No. 329.
Harriett A. Balkam et al
vs
The Woodstock Iron Co et al.

p. 57.

first duly sworn, we did go to and upon the tracts of land within mentioned, which, upon a resurvey, was found to contain eighteen hundred and forty (1,840) acres of land, and, respect being had by us to the improvements and quality of land as well as the quantity of the dower, we did allot and set off to the said Kizia A. Hudson four hundred and eighty (480), more or less, acres of land, bounded as follows—that is to say: Beginning at the N. E. corner of the S. W. ¼ of the S. W. ¼, thence south ¾ of one mile to the S. E. corner of the S. W. ¼ of the N. W. ¼ of sec. 32; thence west to the section line, thence south ¼ of a mile, thence west ¼ of a mile, thence south ¼ of a mile to the section line of section 31; thence north 1¼ mile-

to the N. W. corner of the S. W. ¼ of S. E. ¼ of sec. 30; thence

57 east ¾ of a mile to the beginning, being N. E. ¼; also N. ½ of S. E. ¼; also S. W. ¼ of S. E. ¼, two hundred and eighty acres, in section 31; also the W. ½ of N. W. ¼ of section 32, eighty acres; also the S. W. ¼ of S. W. ¼, section 29, forty acres; also the S. ½ of S. E. ¼ of section 30, 80 acres—twelve forties, containing 480 acres of land, more or less, all of which we allot and set off to the said Kizia A. Hudson for her dower or third part of the within-described tracts of land, and of which we have put her into possession.

In witness whereof we have hereunto set our hands this 7th day of February, 1866.

JOHN A. FINDLEY.
Z. LEATHERWOOD.
GEO. W. HUMPHRIES.
GREEN B. SKELTON.
ALFRED WIGHT.

Filed in office February 9th, 1866, and recorded September 14th, 1866.

A. WOODS,
Judge of Probate.

(Here follows diagram marked p. 57.)

58 STATE OF ALABAMA, }
Calhoun County. }

I certify that I have surveyed off Mrs. Kizia A. Hudson's dower of the Blue Mountain tracts, at Blue Mountain, Calhoun county, State of Alabama, beginning at the N. E. corner of the S. W. ¼ of the S. W. ¼ of sec. 29, thence south ¾ of a mile, thence west ¼ of a mile, thence south ¼ of a mile, thence west ¼ of a mile, thence south ¼ of a mile to section line of 31, thence west ¼ of a mile, thence north 1¼ mile-, thence east ¾ of a mile to the beginning, 5 degrees bearing of the needle, containing four hundred and eighty (480) acres—numbers in the margin.

Blue Mountain, Ala., 7th day of February, A. D. 1866.

W. P. AMERINE,
County Surveyor.

Fee, $10.00.

Chain-carriers: Hiram Sides, William Ford—each two days, $2.00, $1.00.

A. WOODS,
Judge of Probate.

Recorded Sept. 14th, 1866.

Court of Probate for Calhoun County, Alabama.

FEBRUARY 9TH, 1866.

In the Matter of the Dower of KIZIA A. HUDSON, Widow of Samuel P. Hudson, Deceased.

Afterwards, to wit, on the 9th day of February, 1866, came here into court John A. Findley, Z. Leatherwood, Geo. W. Humphries, Green B. Skelton, and Alfred Wight, commissioners duly summoned by the sheriff of said county under the order of this court to allot and set off dower to the said Kizia A. Hudson, widow of the said Samuel P. Hudson, deceased. Under a writ issued from this court it appears that the said John A. Findley, Z. Leatherwood, George W. Humphries, Green B. Skelton, and Alfred Wight,
59 commissioners as aforesaid, have allotted and set off to the said Kizia A. Hudson, widow of the said Samuel P. Hudson, as her dower or third part of said lands and tenements mentioned in her petition for dower now on file in this office, all that portion of the N. E. ¼, also N. ½ of S. E. ¼, also S. W. ¼ of S. E. ¼, in section 31; also W. ½ of N. W. ¼, section 32; also the S. W. ¼ of S. W. ¼ of sec. 29, and also S. ½ of S. E. ¼, sec. 30, being twelve forties, containing four hundred and eighty (480) acres, more or less, all in township 15, range 8 east, as shown by the county surveyor's plat, and situate in said county of Calhoun.

Therefore it is ordered, adjudged, and decreed that the certificate and return of the sheriff and commissioners be filed and recorded, and that the allotment made by the said John A. Findley, Z. Leatherwood, George W. Humphries, Green B. Skelton, and Alfred Wight of the dower and premises to the said Kizia A. Hudson, widow as aforesaid, *to* be final and conclusive between the said Kizia A. Hudson and the children and heirs of the said Samuel P. Hudson, deceased, for and during the natural life of the said Kizia A. Hudson.

A. WOODS,
Judge of Probate.

Probate Court for Calhoun County, Alabama.

FEBRUARY 15TH, A. D. 1866.

This being the day set by a former order of this court, the 9th day of January, A. D. 1866, to hear and determine upon the petition of James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, for the sale of the following-described lands belonging to said estate for the purpose of paying the debts of the

said estate, to wit: S. E. ¼ of S. E. ¼ sec. 30, the N. ½ of N. E. ¼ sec. 32, the W. ½ of S. W. ¼ of sec. 29, the W. ½ of N. W. ¼ sec. 21, the S. W. ¼ of the N. E. ¼ of sec. 21, the N. E. ¼ of N. E. ¼ of sec. 20, the E. ½ of S. E. ¼ of sec. 20, the E. ½ of S. W. ¼ of sec. 29, the S. ½ of N. E. ¼ of sec. 29, the S. W. ¼ of S. E. ¼ of sec. 30, the W. ½ of the S. E. ¼ sec. 29, the E. ½ of S. E. ¼ of sec. 29, the N. E. ¼ of S. E. ¼ of sec. 31, the S. E. ¼ of N. E. ¼ of sec. 31, the N. E. ¼ of S. E.
60 ¼ of sec. 30, the S. W. ¼ of N. E. ¼ of sec. 30, the N. W. ¼ of sec. 30, the N. E. ¼ of S. W. ¼ of sec. 21, the N. W. ¼ of sec. 16, the S. W. ¼ of S. W. ¼ of sec. 30, the S. W. ¼ of N. W. ¼ of sec. 32, the W. ½ of N. E. ¼ sec. 31, the N. E. ¼ of S. W. ¼ of sec. 32, all in township 15, R. 8 east; also the Maddux place, to wit, W. ½ of S. E. ¼, the W. ½ of N. E. ¼, and N. E. ¼ of N. E. ¼ of sec. 31, N. W. ¼ of N. W. ¼ of sec. 32, township 15, R. 8 east; also the E. ½ of N. W. ¼, the N. W. ¼ of N. E. ¼, and the E. ½ of N. W. ¼ of N. W. ¼ of sec. 25, township 14, R. 8, containing one hundred and forty (140) acres, known as the Nunnelly place; also lot in the town of Jacksonville, known as the Walnut-tree lot, lying east of Main street and extending from street leading from Main street to the graveyard, extending to the branch, containing twelve acres, more or less; also the S. ½ of N. E. ¼ and N. E. ¼ of S. W. ¼ sec. 31, township 15, R. 8, and S. ½ of N. E. ¼ sec. 25, township 15, R. 7; also lot No. 21 in the old plan of the town of Jacksonville, containing twenty-five (25) acres, except two acres sold off of the west side of said lot for a graveyard; also lot lying between Brooks lot and Fain lot on Main street, containing between one and three-quarter acres. And comes the said Grant and prays that his said petition and application for the sale of the above-described land be heard and determined at this term of the court, and, it appearing to the satisfaction of the court that notice of the filing of said petition and of the day set for ther hearing of the same had been given according to law, *and* thereupon the court proceeds to hear and determine upon the facts of the said petition; and comes into court L. W. Cannon, as the guardian of the minor heirs of said decedent, and denies each and all of the allegations of said petition, and thereupon said administrator introduces witnesses to sustain the same, and, after hearing all the testimony in the case, the court is of opinion that the allegations of said petition are fully sustained by the evidence in the case.
61 It is therefore ordered and decreed by the court that the above-described lands, as belonging to said estate, be, and the same are hereby, directed to be sold for the payment of the debts of said estate, subject, however, to the widow's dower interest in said lands.

It is further ordered that said lands be sold on a credit of one and two years, with interest from the date of sale.

It is further ordered that said administrator after advertising the sale of said lands in the Jacksonville Republican for three weeks, giving the time, place, and terms of sale, proceed to sell the said lands known as the Steam Mill tract, at Blue Mountain, and the Nunnelly place and town lots, before the court-house door, in the town of Jacksonville, Ala.

It is ordered that said land be sold at public auction to the highest bidder, and that said administrator secure the purchase-money for said lands by taking notes with two good solvent sureties, and it now appearing to the court that Kizia A. Hudson, the widow of the said decedent, has filed in this court her written relinquishment of her dower in the town lot No. 21, in the town of Jacksonville, Alabama, containing twenty-three acres, and a lot lying on Main street, bounded on the north by the Brooks lot and on the east by McGhee street, on the south by Fain lot and on the west by Main street, and in front of the Hudson dwelling-house lot, containing about two acres and three-quarters, on condition that she receive an equivalent in money out of the proceeds of the sale of said lots; and thereupon, after having the proof upon the proper amount, etc., in money, it is ordered and decreed that the said Kizia A. Hudson be, and she is hereby, allowed one-sixth of the purchase-money of said last-named two lots as an equivalent for her dower interest in the same, and that the same be paid over to her by the administrator of said estate when collected.

A. WOODS,
Judge of Probate.

62 To the Hon. A. Woods, judge of the probate court of Calhoun county, Alabama:

The undersigned, administrator of the estate of Samuel P. Hudson, deceased, asks leave to make this his report of the sale of certain real estate, in pursuance of an order heretofore granted him, in which he states that, in pursuance of said order, he did sell to the highest —, on a credit of one or two years, with interest from date, the following-described lands to the following persons and at the prices herein set forth, to wit:

To Green B. Skelton, the E. ½ of S. E. ¼ of sec. 20, T. 15, R. 8, for the sum of	$28 00
To C. J. Cooper, the E. ½ of the S. E. ¼ of sec. 29, T. 15, R. 8, for the sum —	65 60
The N. ½ of N. E. ¼ of sec. 32, R. 8	28 00
To Geo. W. Humphries, the N. W. ¼ of sec. 30, T. 15, R. 8, at the sum of	48 00
To Cain Glover, the S. W. ¼ of N. W. ¼ of sec. 30, T. 15, R. 8, at	13 20
To Hiram Sides, the N. E. ¼ of S. W. ¼ of sec. 32, T. 15, R. 8, at the sum of	10 40
To Mrs. Kizia A. Hudson, the N. ½ of S. E. ¼ of sec. 30, T. 15, R. 8	128 00
The N. W. ¼ of S. W. ¼ sec. 29, T. 15., R. 8, at	60 00
The S. ½ of N. W. ¼ sec. 31, T. 15, R. 8, at the sum of	160 00
The N. E. ¼ of S. W. ¼ of sec. 31, T. 15, R. 8	80 00
The S. ½ of N. E. ¼ of sec. 25, T. 15, R. 7	24 00

The balance of said lands around Blue mountains were not sold for want of a bidder; the lands purchased by Mrs. Kizia A. Hudson

have been paid for in national currency, and said widow says that she is entitled to a distributive share in the proceeds of the sale of the S. ½ of the N. W. ¼ of sec. 31, the N. E. ¼ of S. W. ¼ of
63 sec. 31, the S. ½ of N. E. ¼ of sec. 25, all in township 15, R. 8 and 7, which sold for the sum of $264.00, and to which she submits to your honor to determine. She claims this on the grounds that said lands were not embraced in the lands out of which dower was set aside to her. As to the other lands sold, he has taken notes, with good security, due at one —, with interest from date.

All of which is most respectfully submitted this the 9th day of April, 1866.

——— ———.

Sworn to and subscribed before me this the 9th day of April, 1866.

——— ———.

Also to Kizia A. Hudson, the remainder after the termination of the dower interest in the lands which had been set apart as Mrs. Hudson's dower, which is described in this report of dower for the sum of four hundred and fifty ($450.00) dollars.

THE STATE OF ALABAMA, }
Calhoun County. }

Personally appeared before me, A. Woods, judge of the court of probate in and for said county, J. F. Grant, administrator of the estate of S. P. Hudson, deceased, who, being sworn, says on oath that the foregoing report of sale of real estate belonging to said estate is correct to the best of his knowledge and belief.

J. F. GRANT,
Administrator of S. P. Hudson, Deceased.

Sworn to and subscribed before me this the 9th day of April, 1866.

A. WOODS,
Judge of Probate.

Filed in office April the 9th, 1866, and recorded January 22nd, 1867.

A. WOODS,
Judge of Probate.

This day came James F. Grant, administrator of the estate of S. P. Hudson, deceased, and filed in court a report of the sale of certain land belonging to said estate, which, being examined, is hereby confirmed and ordered to be recorded. Said administrator
64 sets forth in said report that Kizia A. Hudson, who is the widow of the said decedent, claims a distributive share in the proceeds of the sale of the S. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ of sec. 31, and S. ½ of N. E. ¼ of sec. 25, all in township 15, range 8 and 7, which she alleges was not embraced in her application here-

tofore made for dower and the above-described land being embraced in the above report as sold for $264.00. It is ordered by the court that upon the said Kizia A. Hudson's filing her relinquishment of dower in said lands so as to vest a complete title in the purchaser that the said Grant, so soon as said $264.00 is received by him, that he pay ⅛ part over to Kizia A. Hudson in lieu of her dower interest in said lands.

A. WOODS,
Judge of Probate.

Court of Probate for Calhoun County, Alabama.

MAY 15TH, A. D. 1866.

This day came James F. Grant, administrator of the estate of S. P. Hudson, deceased, and returned into court a report of the sale of the real estate belonging to the said estate, which, being examined, is hereby approved and ordered to be recorded and filed in office.

A. WOODS,
Judge of Probate.

To the Hon. A. Woods, judge of the probate court for Calhoun county, Alabama:

James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, most respectfully asks leave to report unto your honor' court that to the best of his knowledge and belief the estate of said decedent is insolvent, and he herewith files a statement of all the assets of said estate in his hands or that has come to his knowledge, the real estate of said decedent having been sold under orders and directions of your honor's court.

He also files a statement of all claims that have been presented against said estate, the character and amount, and names and residence of each creditor, as far as he is able to do, and he asks
65 that your honor fix a day for the hearing of this application and make all such orders and give all such notices as may be required by the statute in such cases, and upon the final hearing he asks that said estate be declared insolvent and such other proceedings had as may be necessary.

Assets of said Estate.

1st. A list of all notes and accounts which were returned in inventory heretofore filed in court, which is now made a part and parcel of this report.	
2nd. Proceeds of sale of personal property sold on the 5th day of March, 1866, on credit of twelve months, interest from date; amount of sale	$505 50
3rd. Proceeds of sale of land sold 20th of March, 1866, on credit of one and two years; amount of sale	1,084 20
4th. Proceeds of sale of land sold on 7th day of ——, 1867, on credit of one and two years, interest from date; am't of sale	1,311 00

5th. Am't collected from Ala. & T. R. Railroad Company upon a claim against company 15th February, 1866		$387 48
6th. Received for rent of land for 1866		40 00
Tot. am't of assets (except old notes & acs.)		$3,328 68

Administrator has received money in currency as follows, to wit:

Am't rec'd of Ala. & T. R. R. Co.	$387 48	
Am't rec'd for rents	40 50	
Am't rec'd on sale of personal property	70 00	
Am't collected on land sold March 20th, 1866.	977 55	
Total am't money rec'd	$1,475 53	1,475 53
Am'ts in notes uncollected		$1,853 53

Administrator has paid out the following sums of money, to wit:

Paid Ellis & Caldwell	$80 00
Paid for advertising up to 15th of February, 1866	75 50
Paid for Judge Woods' fees and costs of dower	98 25
Paid for revenue stamps	2 52
Paid Republican office for advertising land sale	44 00
Paid for advertising postponed sale	30 00
66 Paid A. L. Littlejohn two days' auctioneering	15 00
Paid tax, State & county, 1866	26 00
Paid Mrs. Hudson, keeping stock six weeks	40 00
Paid note Geo. Pope & Co. in removing lien on land	787 50
Paid for advertising land, etc.	74 00
	$1,272 77
Am't rec'd bro't down	1,475 53
Am't of money on hand	$202 76
Am't of notes uncollected in hands of administrator (not including old notes and accounts)	1,853 15
Am't of solvent assets	$2,056 81
Add interest rec'd on money loaned commissioners' court	9 00
Total assets	$2,065 81

From which is to be deducted court fees, att'ys' fees, and com's'n to adm'r.

Error in proceeds of sale of land made 7th of May, 1866.	50 00
	$2,015 81

Claims Filed against the Estate of S. P. Hudson, Deceased, with Names of Creditors, etc.

One note of J. W. Ware, guardian, who did reside in Calhoun county, Ala., and who has since died and Z. Henderson is adm'r for	$62 50
One note by A. B. Littlejohn, *resdies* in Calhoun county, Ala., for	94 00
With several credits on it.	
One note by Merit Nunnelly for	50 00
With a credit of $7.00.	
One account by Parmilee & Nunnelly for	66 98
One account by Parmilee & Crow for	72 79½
One note by Nancy Vickers for (with various credits).	100 00
One note by Stepes & Rowland	179 79
One note by Stepes & Rowland	21 47
One account by J. C. Wood	43 50
One account by G. B. Skelton	25 00
One note by G. B. Skelton	41 72
One note by Whatley & Ellis	350 88
Credits by $50.00.	
One note by Whatley & Ellis	100 00
One account by Whatley & Ellis	350 00
One note by adm'r of L. Weaver (credit, $6.36)	21 00
One judgment by Goode, Mims & Co.	90 90
One note by J. F. Grant	312 80
One note by J. F. Grant	25 00
One note by Eli Borden (credit, $24.87)	55 12
One account by James Meharg	43 00
One balance on note — L. McGinnus	37 00
	$2,133 45½
One note by Dr. F. C. Francis (balance)	67 00
One note by Dr. F. C. Francis	10 00
One account by R. Alexander	38 00
One note by G. B. Douthit	30 00
One note by G. B. Douthit	30 00
One note by adm'r — L. Brook, dec'd	52 00
All the foregoing claimants reside in Calhoun county, Ala.	
One judgment by W. L. Terry, Talladega, Ala.	138 82
One judgment by T. M. Hervey & Co., Charleston, S. C.	22 03
One judgment by Hariland Harold & Co., Charleston, S. C.	215 34
One judgment by Banks, Law & Co., Charleston, S. C. (credit, $454.75)	516 52
67 One judgment by P. C. Calhoun & Co., Charleston, S. C. (credit, $376.40)	1,475 09

One judgment by Banks, Lane & Co., Charleston, S. C. (credit, $00.00)	$128 60
One judgment of E. D. Stoddard & Co. (Charleston, S. C. (credit, 78.00)	318 88
One judgment by Wiley, Banks & Co., Charleston, S. C. (credit, $78.00)	1,717 19
One judgment of Wiley, Banks & Co., Charleston, S. C. (credit, $681.00)	2,736 56
One judgment of E. B. Stoddard & Co., Charleston, S. C.	502 67
One judgment of Wiley, Banks & Co., Charleston, S. C. Transferred of A. C. Wiley of New York	1,822 79
One judgment of Wiley, Banks & Co., Charleston, S. C.	3,531 19
	$15,370 84½
One judgment by A. J. Walker, Montgomery, Ala.	260 34
One judgment of A. P. Horton (residence unknown)	603 75
One judgment of E. B. Stoddard & Co., Charleston, S. C.	1,760 41
One judgment of E. B. Stoddard & Co., Charleston, S. C. (for costs)	16 60
One judgment by Jno. H. Wright, ex't'r, etc., Gadsden, Ala.	79 75
One ac. of E. J. and J. G. Morris, Morrisville, Ala., bal.	104 50
One note by ex't'r of Thomas P. Brackman, of Greenville, S. C.	196 00
One note by ex't'r of Thomas P. Brackman, of Greenville, S. C.	48 49
One note by ex't'r of Thomas P. Brackman, of Greenville, S. C.	160 00
One note by ex't'r of Thomas P. Brackman, of Greenville, S. C. (credit, $50.00)	125 00
One note by same	152 00
One note by same	150 00
One note by L. W. Cannon, Calhoun county, Ala.	127 57
One note by same	85 34
One note by same	25 00
One note by Z. Leatherwood	22 50
One note by Z. Leatherwood	5 37
One account by A. R. Smith	52 49
One account by A. R. Smith	187 49
One account by A. R. Smith	74 20
One note by W. R. Hubbard	30 00
One account by E. G. Morris	69 50
One account by John Lloyd	89 80
One account by Morgan & Cooper	219 96
One note by M. M. Anderson	50 00
One note by R. M. Dickson	163 05
One note by Roosevelt, Hyde & Clarke, Ch'leston, S. C.	441 19
One note by Roosevelt, Hyde & Clarke, "	241 04

One note by Roosevelt, Hyde & Clarke, Ch'leston, S. C.	$209 16
One note by Roosevelt, Hyde & Clarke, "	232 72
	$21,366 40½
One note by Clarke, Hyde & Co., Charleston, S. C....	67 23
One note by Clarke, Hyde & Co., Charleston, S. C....	142 86
One note by J. D. Hoke & Bro., Calhoun county, Ala.	97 96
One account by J. D. Hoke & Bro., " " "	73 83
One account by W. H. Fleming, Calhoun Co., Ala...	69 15
One note by J. M. Crook (Texas) (credit, $108.57)....	623 67
One note by same.....	1,233 53
One note by same.....	1,233 53
One note by same.....	1,233 53
One ac. by adm'r J. H. Farmer, Calhoun Co., Ala....	5 20
One ac. by adm'r J. H. Farmer, Calhoun Co., Ala....	62 10
One ac. by adm'r J. H. Farmer, Calhoun Co., Ala., credit by $25.90.....	16 00
One receipt by W. McElrath, Cherokee Co., Ala.....	139 00
One note by Brockman, ex't'r, etc., Greenville.....	28,882 34
One ac. by R. E. W. McAdams, Calhoun Co., Ala....	132 50
One ac. by J. C. & M. W. Francis.....	62 19
[One ac. by Z. Leatherwood]*.....	57 00
Total am't claims presented.....	$29,496 66½

(Not including interest on them.)

68 Personally came before me, A. Woods, judge of probate for said county, J. F. Grant, administrator of the estate of Samuel P. Hudson, deceased, who, being duly sworn, says that the foregoing report, made under the statute upon an application to have said estate declared insolvent, is true, to the best of his knowledge and belief.

This 13th day of February, 1868.

J. F. GRANT.

A. WOODS,
Judge of Probate.

Filed in office February 13th, 1868, and recorded April 20th, 1868.

A. WOODS,
Judge of Probate.

Court of Probate for Calhoun County, Alabama.

MARCH 23RD, A. D. 1868.

This being the day set by a former order of this court for to hear and determine upon the application of J. F. Grant, administrator of the estate of Samuel P. Hudson, deceased, asking that said estate be declared by order of this court insolvent, and *that* this term of the court the said Grant, as administrator as aforesaid, appears in court

* [Words in brackets erased in copy.]

in person and by attorney and prays that his said application be heard and determined upon at this term of the court; and it appearing to the satisfaction of the court that due and legal notice has been given, as required by law, appointing this day for the hearing and determining upon said application, and thereupon the court proceeds to hear and determine upon the same, and after a full investigation of all the facts connected with application and due consideration of the same it is considered that said estate is insolvent and unable to pay its debts, it is therefore ordered and decreed that said estate be*ing*, and the same is hereby, declared insolvent; and thereupon it is further ordered that the 19th day of April, 1868, be set for making settlement of said estate as an insolvent estate,
69 and that the said Grant appear in court on that day and file his account and vouchers and make settlement of said estate as an insolvent estate, and that notice thereof be given to the creditors of said estate by publication in the Jacksonville Republican, a weekly newspaper published in said county, for three successive weeks and by posting notice upon the court-house door for the same length of time and by forwarding by mail notice to the creditors of the said estate whose residences are known that said creditors may appear in court at the time set above for making said settlement and nominate a future administrator of said estate as an insolvent estate if they think proper.

It is further ordered that said application be recorded and filed in court.

A. WOODS,
Judge of Probate.

To Hon. A. Woods, judge of probate for Calhoun county, Alabama:

James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, in pursuance of an order of your honor's court, files this his account and vouchers for a final settlement of his administration, which he asks may be examined, audited, and allowed:

James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, Dr.

To am't of Confederate money rec'd from sale of personal property, sold for cash, 24 day of Jan., 1864		$3,586 55
To am't from R. J. C. Hail	$44 00	
To am't Confed. money collected on claims on William Knox	184 00	
To am't from J. R. Emery	4 90	
Am't from Navy foundry, Selma	360 00	
Am't from L. A. Weaver	23 50	
Am't from witness ticket	5 00	
Am't of Gov't claim	39 50	
Am't from Gov't bond	850 00	
Am't from Oxford Iron Company	250 00	
		1,759 40
To am't Confed. money bro't forward		**$5,345 95**

Am't from D. F. Shuford	$75 00	
Am't collected from Jas. R. Brown	136 00	
		$211 00
Total am't of Confed. money rec'd		$5,556 95

CONTRA.

By amount of money paid out:

By No. 1, p'd C. R. Lester for coffin	$35 00	
By No. 2, p'd stage fare to Blue M't'n	5 00	
By No. 3, p'd Asa Skelton, appraiser	18 00	
By No. 4, p'd Ab. Littlejohn, auctioneer	15 00	
By No. 5, p'd William Ford	5 00	
70 By No. 6, p'd Ryan & Forney	1,069 73	
By No. 7, p'd Ryan & Rowland	38 73	
By No. 8, p'd two judgments	1,877 88	
By No. 9, p'd G. C. Ellis' note	615 12	
By No. 10, p'd judgm'nt by Geo. Page & Co.	861 66	
By No. 11, p'd G. B. Douthit, costs	15 15	
By No. 12, p'd Ryan & Rowland	669 49	
By No. 13, p'd W. H. Forney, note	25 73	
By No. 14, p'd W. H. Forney, note	386 50	
By No. 15, p'd Ryan on B. A. Brox note	56 94	
By No. 16, p'd C. R. Lester, bal. on coffin	40 00	
By No. 17, p'd expense to Selma	24 25	
By No. 18, pa-d J. A. Findley, app'r	8 25	
By No. 19, p'd A. Woods' expenses	5 00	
By No. 20, p'd F. A. Findley, *p'd* draft	17 00	
By No. 21, p'd Confed. tax	208 00	
By No. 22, p'd State & county tax	56 90	
		$6,051 11
Paid out by administrator more than received		$494 16
To amount of sale of personal property sold 5th of March, 1866, on credit of 12 months, interest from date	$505 50	
To am't sale of land sold on 20th of March, 1866, upon a credit of 1 & 2 years, interest from date of sale	1,040 80	
To am't sale of land sold 7th of May, 1866, on 1 & 2 years' credit, interest from date	1,261 00	
To am't of sale interest in land sold 15 July, 1867, on credit until 1st January, 1868, interest from date of sale	80 00	
To am't of stock in mining company, sold on same terms	8 00	
To am't collected from Ala. & T. R. R. Company 15 February, 1866	377 48	

To am't rec'd from rents of land for the year 1866 and interest	$40 50	
To am't of interest on money loaned	9 00	
To am't rec'd on settlement, L. W. Cannon	118 86	
		$3,451 14

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Voucher.

No. 1, by am't p'd Ellis & Caldwell	$50 00	
No. 2, by am't p'd for advertising	75 50	
No. 3, by am't p'd A. Woods, costs	98 25	
No. 4, by am't p'd for revenue stamps	2 52	
No. 5, by am't p'd Ellis & Caldwell, fees	30 00	
No. 6, by am't p'd for advertising land sale	44 00	
No. 7, by am't p'd for postponed land sale	30 00	
No. 8, by am't p'd Ab. Littlejohn, auctioneer.	15 00	
No. 9, by am't p'd Geo. Page, note	650 00	
No. 10, by am't p'd bal. on same	137 50	
No. 11, by am't p'd State & Co. tax	26 00	
No. 12, by am't p'd Mrs. Hudson	40 00	
No. 13, by am't advertising sale	94 00	
No. 14, by am't p'd notice of insol	18 00	
No. 15, by am't p'd notice of set	11 25	
No. 16, by am't p'd settlement with L. W. Cannon	118 86	
No. 17, by am't p'd A. Woods, fees	127 32	
No. 18, by am't p'd Ellis & Caldwell	90 00	
Commissions allowed on am't rec'd and paid out	81 58	
Commissions on receipts	46 15	
		$1,759 93
No. 19, by a note of J. D. Hoke *et als*	$30 00	
No. 20, by a note of G. B. Douthit	8 00	
No. 21, by a note of W. T. Pricket *et al*	332 50	
No. 22, by a note, Geo. W. Humphries	24 00	
No. 23, by G. B. Skelton's note	28 00	
No. 24, by W. H. Forney's notes	350 00	
No. 25, by W. H. Forney's notes	350 00	
No. 26, by Cain Glover	6 60	
No. 27, by J. N. & S. W. Crook	561 00	
No. 28, by Mrs. Hudson's balance	51 00	
No. 29, by C. J. Cooper	46 80	
No. 30, by Cain Glover	6 20	
No. 31, by Wm. Adams	52 00	
		1,846 50
Total amount of credits		$3,605 43
From which deduct indebtedness		3,451 14
Leaves estate indebted to adm'r		$155 29

Personally came J. F. Grant, administrator of S. P. Hudson, deceased, who, being duly sworn, says that the foregoing account between himself and said estate is correct, to the best of his knowledge and belief.

J. F. GRANT,
Administrator.

Sworn to and subscribed before me this 29th day of April, 1868.
A. WOODS,
Judge of Probate.

Voucher No. 3.

James F. Grant, administrator of S. P. Hudson, deceased, Dr.

To Asa Skelton, one of the appraisers of said estate, for six days' service as appraiser at $2.00 per day	$12 00
Two days counting timber	4 00
One day acting as clerk at sale	2 00
	$18 00

72 Received of James F. Grant, administrator of S. P. Hudson, deceased, eighteen ($18.00) dollars, in full of the above account, this 13th day of January, 1864.

ASA SKELTON.

Voucher No. 5.

Received of James F. Grant, administrator of estate of S. P. Hudson, deceased, five dollars, for counting timber trees cut off of Steam Mill land by Ala. & Tenn. *R.* Railroad Company. January 22nd, 1854.

WILLIAM T. FORD.

Voucher No. 6.

Received of J. F. Grant, administrator of Samuel P. Hudson, deceased, one thousand and sixty-nine and seventy-three one-hundredths dollars, in full for redemption of Steam Mill land and of lot 21, in the town of Jacksonville, Ala., and for which we have this day executed quitclaim deed to said Grant, administrator as aforesaid, this 6th February, 1854.

DANIEL T. RYAN.
W. H. FORNEY,
Per DANIEL T. RYAN.

Voucher No. 7. $30.00.

Due Ryan & Rowland thirty dollars, borrowed money, January 18th, 1860.

February 6th, 1854.—Received of J. F. Grant thirty-eight and $\frac{72}{100}$ dollars, in full of the within, as administrator of S. P. Hudson.

RYAN & ROWLAND.

Voucher No. 8.

Received, Jacksonville, Alabama, February 6th, 1854, of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, eighteen hundred and seventy-seven $\frac{88}{100}$ dollars, amount of two judgments in the circuit court of Calhoun county against S. P. Hudson, in favor of Johnston, Cruse & Bowley; said judgments transferred to Daniel T. Ryan and W. H. Forney.

DANIEL T. RYAN.
W. H. FORNEY,
By DANIEL T. RYAN.

73 Voucher 9.

$497.70. By the first day of January next we or either of us promise to pay G. C. Ellis or order four hundred and ninety-seven $\frac{70}{100}$ dollars, with interest from date, for value received, this 28th of February, 1861.

S. P. HUDSON.
W. H. FORNEY.
DAN'L T. RYAN.

$615.12. Received of James F. Grant, administrator of S. P. Hudson, deceased, six hundred and fifteen $\frac{12}{100}$ dollars, in full of this note, this February 6th, 1864.

G. C. ELLIS.

Voucher No. 10.

GEO. PAGE & Co.
vs.
S. P. HUDSON.

Received of J. F. Grant, administrator of Samuel P. Hudson, deceased, eight hundred and sixty-one $\frac{66}{100}$ dollars, the above judgment, this February 6th, 1864, and for which my receipt stands on the execution docket. February 6, 1864.

G. B. DOUTIT, *Clerk.*

Voucher No. 11. $15.15.

JOHNSTON, CREWS & BOWLEY
v.
S. P. HUDSON. } Circuit Court.

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, fifteen and $\frac{15}{100}$ dollars, costs in this case, this February 6th, 1864.

G. B. DOUTHIT, *Clerk.*

Voucher No. 12.

$667.49. February 6, 1864.—Received of J. F. Grant, as administrator of S. P. Hudson, six hundred and sixty-seven and $\frac{49}{100}$ dollars, in full of our book accounts against S. P. Hudson, deceased.

RYAN & ROWLAND.

Voucher No. 13. $20.00.

Due W. H. Forney $20.00, borrowed this July 23rd, 1860.

S. P. HUDSON.

74 Received of James F. Grant, administrator of S. P. Hudson, deceased, twenty-five and $\frac{73}{100}$ dollars, in full of this note. February 6th, 1864.

W. H. FORNEY,
Per J. B. F.

Voucher No. 14.

$300.00. One day after date we promise to pay Geo. C. Whatley or order three hundred dollars for value received—borrowed money. March 31st, 1860.

S. P. HUDSON.
W. H. FORNEY.

Received, February 6th, 1864, of J. F. Grant, administrator of S. P. Hudson, deceased, three hundred and eighty-six $\frac{50}{100}$ dollars, in full of the within note.

J. B. & G. H. FORNEY.

Voucher No. 15.

One day after date I promise to pay to Hudson & Stokes or order thirty-four dollars and twenty cents, for value received of them. September 6th, 1865.

BENJAMIN A. BROOKS.

February 6th, 1864.—Received of J. F. Grant, administrator of S. P. Hudson, deceased, fifty-six and $\frac{94}{100}$ dollars of the within note.

D. T. RYAN.

Voucher No. 18.

The estate of S. P. Hudson to J. A. Findley, Dr.

December —, 1863. To five and one-half days as appraiser and making inventory of said estate.. $8 25

Received payment of J. F. Grant, administrator, March 11th, 1864.

JOHN A. FINDLEY.

Voucher No. 19.

$5.00. Received of J. F. Grant, administrator of S. P. Hudson, deceased, five dollars, expenses of going to Selma, Ala., to find money of estate, this 25th day of March, 1864.

A. WOODS, *Judge, etc.*

75 Voucher No. 20.

Received, this 23rd day of ——, 1864, of James F. Grant, administrator of S. P. Hudson, deceased, late P. M. at Blue Mountain, Alabama, $16.94, in full of the postmaster's general draft No. 2204.

JOHN A. FINDLEY.

P. M. at Blue Mountain, duplic*tae*.

Voucher No. 21.

STATE OF ALABAMA, }
14*th Collector's District.* }

Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, the sum of forty-one $\frac{60}{100}$ —, tax payable by him for tax year ending December 31st, 1864. March 31st, 1865.

$41.60.

H. A. EARNS,
Collector 14*th District.*

STATE OF ALABAMA, }
Collector's District. }

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, the sum of two hundred and eight dollars, 5 % tax, the amount of the S. 5 % payable by him for the rax year ending December 31st, 1864. March 31st, 1865.

H. A. EARNS,
Collector for Fourteenth District.

Voucher No. 22.

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, fifty-six and $\frac{70}{100}$ dollars, his tax of 1864. March 13th, 1865.

H. GRAHAM, *T. C.*

Vouchers Paid in Currency.

Voucher No. 1.

Received of J. F. Grant, administrator of S. P. Hudson, fifty dollars, in part payment of attorney's fees in the estate of S. P. Hudson, deceased. Jacksonville, February 15th, 1866.

ELLIS & CALDWELL.

Voucher No. 2.

Estate of S. P. Hudson, deceased, to Republican, Dr.

Nov. 14, 1863.	To adv. notice to creditors, 6 times.....	$3 50
Dec. 19, 1863.	To adv. sale per property, 5 sq., 5 times.....	15 00
Dec. 8, 1864.	To adv. land to rent, 1 sq., 4 t.....	5 00

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Nov. 25, 1865.	To adv. land to rent, 1 sq., 3 t.....	4 00
Jan. 13, 1866.	To adv. ap. to sell land, 9 sq., 3 t.....	36 00
Feb. 3, 1866.	To adv. sale of steam-mill machinery 20–7..	12 00
		$75 50

Received payment, February 15th, 1866.

J. F. GRANT.

Voucher No. 3.

$98.25. Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, ninety-eight dollars and twenty-five cents, my fees up to date, and surveyors' and chain-carriers' fees, sheriff's fees, and commissioners' fees, and witnesses' and guardian *ad litem's* fees, and commissioners' fees, this 15th February, 1866.

A. WOODS,
Judge of Probate.

Voucher No. 5.

Received of J. F. Grant, administrator of Samuel P. Hudson, deceased, thirty dollars in part fees for services about said administration, this 9th of April, 1866.

ELLIS & CALDWELL, *Attorneys.*

Voucher No. 6.

Administrator of S. P. Hudson, deceased, to Republican office, Dr.

Feb. 17, 1866. To adv. sale of land and lots, 8 sq., five times. $44 00

Received payment in full April 9th, 1866.

J. F. GRANT.

Administrator of the estate of S. P. Hudson, deceased, to Republican office, Dr.

April 14, 1866. To adv. postponed sale of unsold lands and lots, 6 sqs., 4 times..... $30 00

Received payment in full April 16th, 1866.

J. F. GRANT.

Voucher No. 8.

Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, fifteen dollars for two days auctioneering of sales on said estate. July 6th, 1866.

AB. LITTLEJOHN.

Voucher No. 9.

JACKSONVILLE, ALABAMA, *April 15th*, 1860. $750.

Nine months after date we or either of us promise to pay George Page & Company or order seven hundred and fifty dollars for value received.

Given under our hands and seals.

Payable at the office of the Talladega Ins. Company, at Talladega, Alabama.

SAMUEL P. HUDSON. [SEAL.]
DAN'L T. RYAN. [SEAL.]
W. H. FORNEY. [SEAL.]

77 Paid off by J. F. Grant and W. H. Forney, $787.50, July 18, 1866.

Voucher No. 10.

$115.00. Received, December 15, 1866, of J. F. Grant, by the hands of Rev. N. Duncan, one hundred and fifteen dollars, being balance of principal debt due on note of said Grant and W. H. Forney, for one hundred and thirty-seven & $\frac{50}{100}$ dollars, given on compromise of claims of Geo. Page & Company; said note not delivered now, but hereafter to be delivered.

GEO. WALDEN,
For WALDEN BOWIE.

Voucher No. 11.

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, seventy-six dollars, his tax of 1866. July 18th, 1867.

H. GRAHAM, *T. C.*

Voucher No. 12.

Received of J. F. Grant, administrator of S. P. Hudson, forty dollars for keeping eight head of stock, mules and cows, for appraisement to sale day, six weeks. July 24, 1866.

K. A. HUDSON.

Voucher No. 13.

The estate of S. P. Hudson, deceased, to Republican office, Dr.

April 24, 1867. To adv. petition to sell a ¼ interest in lands and shares in mining company stock, 8 sqs., 3 times..... $32 00

June 15, 1867. To adv. sale of land & stock, etc., 75, 5 times 42 00

Received payment February 15th, 1868.

J. F. GRANT.

Voucher No. 14.

Estate of S. P. Hudson, deceased, to Republican office, Dr.

Feb. 15, 1868. To adv. first insolvent notice, 3 sq., 5 weeks. $18 00

Received payment April 28th, 1868.

J. F. GRANT.

78 Voucher No. 15.

The estate of S. P. Hudson, deceased, to Republican office, Dr.

April 4, 1868. To adv. insolvent settlement, 3 sq, 3 times.. $11 25

Received payment April 28th, 1868.

J. F. GRANT.

Voucher No. 16. $25.00.

Borrowed from L. W. Cannon twenty-five dollars, this 31st March, 1860.

S. P. HUDSON,

Received of J. F. Grant, administrator of S. P. Hudson, deceased, in settlement of full amount of this note. March 16, 1867.

L. W. CANNON.

$127.50. One day after date I promise to pay to L. W. Cannon or order one hundred and twenty-seven and $\frac{50}{100}$ dollars for value received, this December 1st, 1860.

S. P. HUDSON.

Received of Ira C. Hill on this note thirty-four and $\frac{46}{100}$ dollars.

Received of J. F. Grant, administrator of S. P. Hudson, on settlement, the full amount of this note. March 16, 1867.

L. W. CANNON.

Voucher No. 17.

Received of James F. Grant, administrator of the estate of S. P. Hudson, deceased, one hundred and twenty-one and thirty-two hundredths dollars, my fees on final settlement as an insolvent estate, this 29th of April, 1868. ($68.61 due on this receipt.)

A. WOODS.
Judge of Probate.

Voucher No. 18.

James F. Grant, adm'r S. P. Hudson, deceased, to Ellis & Caldwell, Dr.

1866.		
April 9.	To writing two deeds	$10 00
April 9.	Certificate of sale of land	5 00
June 26.	To filing application to sell interest in lands belonging to A. Woods, M. C. & Co	15 00
1868.	To filing a report of insolvency	25 00
	To making out report of sales of real and personal property	10 00
	To making out accounts and attending to final settlements	25 00
		$90 00

79 Received of J. F. Grant, administrator, ninety dollars in full of fees up to this date. April 30th, 1868.

ELLIS & CALDWELL, *Attorneys.*

Notes Turned In.

Voucher No. 19.

By the first day of January next we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, deceased, thirty dollars, with interest from date, for the purchase of Hudson's estate's interest in the Lindsay lands. July 15, 1867.

JOHN D. HOKE.
E. L. WOODWARD.
C. J. CLARKE,
By H. A. EARNS, *Agent.*

Voucher No. 20.

$8.00. On or before the first day of January next we or either of us promise to pay to *pay* J. F. Grant, as administrator of the estate of S. P. Hudson, deceased, or bearer the sum of eight dollars for value received, with interest from date.

G. B. DOUTHIT.
D. F. SHUFORD.

Voucher No. 21.

$332.50. Twelve months after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, deceased, three hundred and thirty-two and $\frac{50}{100}$ dollars, with interest from date, for value received. March 5, 1866.

W. P. PRICKET.
D. P. GUNNELS.
S. C. WILLIAMS.

Voucher No. 22.

$24.10. Two years after date we or either of us promise to pay to J. F. Grant, administrator of S. P. Hudson, deceased, the sum of twenty-four dollars, with interest from date, value received, it being in part payment of the purchase-money for the N. W. $\frac{1}{4}$ of sec. 30, T. 15, R. 7.

Given under our hands and seals this the 20th day March, 1866.

GEO. W. HUMPHRIES. [SEAL.]
G. B. SKELTON. [SEAL.]
JOHN MILLER. [SEAL.]

80 Voucher No. 23.

$14.00. Twelve months after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, the sum of fourteen dollars, value received, with interest from date, it being in part payment of the purchase-money for the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ sec. 20, township 15, range 7. Given under our hands and seals this the 20th day of March, 1866.

Blue Mountain, Calhoun county, 20th of March, 1866.

G. B. SKELTON.
JOHN MILNER. [SEAL.]
GEO. W. HUMPHRIES. [SEAL.]

$14.00. Two years after date we or either of us promise to pay to J. F. Grant, administrator of estate of S. P. Hudson, deceased, the sum of fourteen dollars, value received, with interest from date, it being part payment of the purchase-money for the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ sec. 20, township 15, R. 7. Given under our hands and seals this 20th day of March, 1866.

Blue Mountain, Ala., 20th March, 1866.

G. B. SKELTON. [L. S.]
JOHN MILNER. [L. S.]
GEO. W. HUMPHRIES. [L. S.]

Voucher No. 24.

$350.00. Twelve months after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, deceased, or order three hundred and fifty dollars, with interest from date, it being in part payment for the N. W. ¼ of sec. 21, and the S. W. ¼ of N. E. ¼ and N. E. ¼ of S. W. ¼ *and* sec. 21; also the S. W. ¼ of sec. 16, and the N. E. ¼ of N. E. ¼ of sec. 20, and the E. ½ of sec. 29, less N. E. ¼ of N. E. ¼ in said E. ½, all in township 15, R. 8, in the Coosa land district. This note to be taken as so much cash upon the settlement of said estate for the payment of which may be allowed to certain creditors which W. H. Forney controls, to wit: He claims of Wiley, Banks & Company against said estate and E. B. Stoddard & Company, P. C. Calhoun, and divers others, this 7th day of May, 1866, said lands having been sold by said Grant at administrator's sale.

W. H. FORNEY.
D. P. FORNEY.

81 Voucher No. 25.

$350.00. Two years after date, with interest from date, we or either of us promise to pay to James F. Grant, administrator of the estate of S. P. Hudson, deceased, or order three hundred and fifty dollars, being in part payment for the N. W. ¼ of sec. 21 and S. W. ¼ of N. E. ¼ and N. E. ¼ of S. W. ¼ of sec. 21 and S. W. ¼ of sec. 16 and N. E. ¼ of N. E. ¼ of sec. 20 and E. ½ of sec. 29, except N. E. ¼ of N. E. ¼ of said section, all in township 15, R. 8 E., in the Coosa land district, said land sold by said Grant at administrator's sale. This note to be taken as so much cash upon settlement of said estate for the part which may be allowed certain creditors which W. H. Forney controls, to wit, the claims of Wiley, Banks & Company, Roosevelt, Hyde & Clarke, E. S. Stoddard & Company, and divers others, this 7th May, 1866.

W. H. FORNEY.
D. P. FORNEY.

Voucher No. 26.

$6.60. Twelve months after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, deceased, the sum of six dollars and sixty cents, it being in part payment for the S. W. ¼ of N. E. ¼ of sec. 30, at 33 cents per acre. Given under our hands and seals this 20th day of March, 1866.

C. GLOVER. [L. S.]
G. B. SKELTON. [L. S.]
C. J. COOPER. [L. S.]

Voucher No. 27.

$280.50. Twelve months after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, de-

ceased, two hundred and eighty dollars and fifty cents, with interest from date, for value received, this 7th day of May, 1866.

JOHN M. CROOK.
SAMUEL W. CROOK.

$280.50. Two years after date we or either of us promise to pay to J. F. Grant, administrator of S. P. Hudson, deceased, two hundred and eighty dollars and fifty cents, with interest from date, for value received, this 7th day of May, 1866.

SAMUEL W. CROOK.
JOHN M. CROOK.

82 Voucher No. 28.

$91.00. Twelve months after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, deceased, ninety-one dollars, with interest from date, for value received. March 5, 1866.

K. A. HUDSON.
H. W. VAN HAGAN.
L. W. CANNON.

Received on the within note forty dollars. July 24th, 1867.

Voucher No. 29.

$46.80. Two years after date we or either of us promise to pay to J. F. Grant, the administrator of the estate of S. P. Hudson, deceased, the sum of forty-six dollars and eighty cents, it being part payment of the purchase-money on the E. ½ of S. W. ¼ of sec. 29, at 82 cents per acre, and the N. ½ of the N. E. ¼ of sec. 32, at 35 cents per acre. Given under our hands and seals this 20th day of March, 1866.

C. J. COOPER. [L. S.]
C. GLOVER. [L. S.]
G. B. SKELTON. [L. S.]

Voucher No. 30.

$6.60. Two years after date we or either of us promise to pay to J. F. Grant, administrator of the estate of S. P. Hudson, deceased, the sum of six dollars and sixty cents, being in part payment for the S. W. ¼ of the N. E. ¼ of sec. 30, at 33 cents per acre. Given under our hands and seals this 20th day of March, 1866.

C. GLOVER. [L. S.]
G. B. SKELTON. [L. S.]
C. J. COOPER. [L. S.]

Voucher No. 31.

$82.00. Twelve months after date we or either of us promise to pay to James F. Grant, administrator of the estate of S. P. Hudson,

deceased, eighty-two dollars, with interest from date, for value received. March 5th, 1866.

W. ADAMS.
A. ADAMS.
W. H. FORNEY.

Filed in office 29th of April, 1868, and recorded together with the vouchers May 7th, 1868.

A. WOODS,
Judge of Probate.

83 To the Hon. A. Woods, judge of the probate court of Calhoun county, Alabama:

James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, herewith filed his account and vouchers for a final settlement and distribution of assets of said estate, and he asks that the same may be passed, allowed, and that he be discharged from all further liabilities as said administrator.

James F. Grant, administrator of the estate of S. P. Hudson, deceased.

DR.

The amount collected on Crook's note		$678 00
The amount collected on Cain Glover's note		15 57
The amount received from sale		12 00
The amount rec'd from G. W. Humphries' note		30 00
The amount rec'd from Mrs. Hudson's note		70 28
The amount rec'd from G. B. Douthit note		9 25
		$815 10
The amount rec'd from Prickett's note	$415 69	
The amount rec'd from William Adam note	70 89	
The amount rec'd from Jennings' note	874 00	
The amount rec'd from J. D. Hoke's note	34 50	
		1,395 08
Total indebtedness		$2,210 18

CR.

By amount due administrator on last settlement	$155 29	
By amount p'd for rev. stamps	4 50	
By amount p'd William Henderson	113 00	
By amount p'd for advertising	9 00	
By amount p'd for express charge	75	
By amount of commissions on $2,210	110 50	
By amount of attorneys' fees, Ellis & Cladwell.	90 00	
By amount of A. Woods' fees	50 40	
		533 44
To be distributed among creditors		$1,677 74

Court of Probate, Calhoun County, Special Term.

JUNE 15, 1869.

This day came J. F. Grant, administrator of the estate of S. P. Hudson, deceased, who, being duly sworn, says the above account between himself and said estate is correct.

J. F. GRANT
Administrator.

Sworn to and subscribed before me this 15th day of June, 1869.
A. WOODS,
Judge of Probate.

Voucher No. 1.

Received of J. F. Grant, administrator estate of Samuel P. Hudson, deceased, one hundred and thirty dollars in full of the amount due me as my distributive portion arising from the sale of lots known as the graveyard lot and vacant lot in front of my dwelling, graveyard lot containing twenty-three acres, more or less, and the other containing about 1¾ acres; and the court is hereby authorized to receive this receipt in satisfaction of any decree that may be rendered for said money, this 26th day of May, 1869.

MRS. K. A. HUDSON.

84 Voucher No. 2.

J. F. Grant, administrator of the estate of S. P. Hudson, to Republican office, Dr.

May 22, 1869. To advertising final settlement, 3 sq., 3 t..... $9 00

Received payment June 14th, 1869.

J. F. GRANT.

J. F. Grant, administrator of the estate of Samuel Hudson, deceased, to Ellis & Caldwell, Dr.

To writing report of sale of land to S. W. Crook.....	$5 00
To writing deed.....	10 00
To making out account and attending settlement.....	50 00
To writing deed to Skelton.....	5 00
To writing deed to Humphries.....	5 00
To writing deed to Glover.....	5 00
To writing deed to Mrs. Hudson.....	5 00
To writing deed to Hoke *et als*.....	5 00
	$90 00

Received payment in full this 15th of June, 1869.

ELLIS & CALDWELL.

No. 4.

Received of J. F. Grant, administrator of S. P. Hudson, deceased, as an insolvent estate, fifty dollars and forty cents, fees of probate

court on final settlements and distributed among the creditors. June 15, 1869.

A. WOODS,
Judge of Probate.

January 1st, 1863, Amount of Claims for Distribution.

G. C. Ellis, surviving partner	$920 00		
Geo. Stipes	275 00		
J. C. Francis	255 00		
Francis & Francis	84 00		
W. R. Hubbard, adm'r	65 00		
L. W. Cannon	100 00		
J. F. Grant	389 00		
			$1,988 00
John M. Crook, estate	$486 00		
John M. Crook, estate	690 00		
			5,550 00
G. B. Douthit	$74 00		
G. B. Douthit, costs	179 00		
John Hoke	206 00		
Z. Leatherwood	53 00		
J. H. Privitt	160 00		
			429 00
Estate of Thomas P. Hudson	$2,075 00		
Brockman, Tulula	785 00		
			2,842 00
Roosevelt, Hyde & Co	$1,390 00		
Clarke, Hyde & Co	30 00		
T. M. Harvey & Company	685 00		
			2,105 00
Thomas A. P. Heart & Co	$240 00		240 00
P. C. Calhoun	2,460 00		
E. B. Stoddard & Company	9,746 00		
Wiley, Banks & Co., Brooks, Land & Co	40 00		
Harville & Haral & Co	.....		1,224 60
85 Bancroft, Betts & Marshall	$475 00		
John S. Linton	500 00		
			–,266 28
G. C. Ellis	$58 95		
G. C. Stipes	19 30		
J. C. Francis	9 75		
J. C. & M. W. Francis	5 29		
W. R. Hubbard	4 08		
L. W. Cannon	6 30		
J. F. Grant	24 00		
J. N. Crook	349 00		
G. B. Douthit	13 90		
J. D. Hoke	12 95		
Z. Leatherwood	4 15		

J. H. Prickett	$9 95
Tulula Brokman	48 35
Roosevelt, Hyde & Clarke	87 55
T. M. Harvey	1 88
Thomas A. P. Horton	43 15
E. B. Stoddard & Company	154 95
T. C. Calhoun	15 12
Harold & Company	2 52
Wiley, Banks & Company	613 95
Bancroft, Betts & Marshall	28 80
John S. Linton	31 50
James P. Hudson, adm'r	129 55

Received of J. F. Grant, administrator of S. P. Hudson, deceased, $17.30, in full of the amount of my distributive share of the estate of S. P. Hudson, deceased.

GEO. STIPES.

Received of J. F. Grant, administrator of S. P. Hudson, deceased, $9.90, in full of my distributive share of the assets of the estate of S. P. Hudson, deceased. June 15, 1859.

JAS. H. PRIVETT.

Received of J. F. Grant, administrator S. P. Hudson, deceased, $15.90, in full of my distributive share of said estate, as shown by the distribution this day made, this 25th of June, 1869.

G. B. DOUTHIT.

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, $58.95, in full of my *pro rata* share of said estate, as shown by the distribution of said estate *estate* among the creditors thereof, this 15th *15th* of June, 1869.

G. C. ELLIS,
Surviving Partner of Whatley & Ellis.

Received of J. F. Grant, administrator estate S. P. Hudson, deceased, $12.95, in full of my distributive share of the assets of said estate. June 15, 1869.

JOHN D. HOKE.

86 Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, $5.29, in full of my distributive share of assets of said estate. June 15, 1869.

J. C. & M. W. FRANCIS.

Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, $349.50, in full of our *pro rata* shares of said estate in a final settlement of the same among the creditors thereof.

JAMES CROOK,
As Administrator of Estate of John W. Crook, Deceased.
SAMUEL W. CROOK,
Per JAMES CROOK,
Ag't & Attorney.

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, the following *pro rata* shares decreed to the following creditors, viz:

Thos. P. Hudson, adm'r estate Thos. P. Hudson	$129 55
Tulula Brockman	48 35
Roosevelt, Hyde & Clarke	87 55
T. M. Harvey & Company	1 88
Thos. A. P. Horton	43 15
P. C. Calhoun & Company	15 12
E. B. Stoddard & Company	154 95
Wiley, Banks & Co. & Wiley, Land & Co.	
" " " " " "	613 95
Harold & Company	2 52

which said sums were found due them on a final settlement of said estate on the 15th of June, 1869, and decrees rendered up in favor of each, and the above is full for said decrees. June 15th, 1869

W. H. FORNEY,
Attorney for All.

Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, $6.30, in full of my *pro rata* share of said estate, as one of the creditors, as shown by the distribution of said estate, this 15th of June, 1869.

L. W. CANNON.

Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, $975, in full of my *pro rata* share of the assets of said estate, this June 15th, 1869.

J. C. FRANCIS.

87 Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, $4.08, in full of the *pro rata* share of said estate, as shown by the distribution this day made in the probate court of Calhoun county. June 16, 1869.

W. R. HUBBARD,
Administrator,
Per J. C. ELLIS.

Received of J. F. Grant, administrator of the estate of S. P. Hudson, deceased, $28.80, in full of *pro rata* share of Bancroft, Betts & Marshall, as creditors of said estate, as shown by distribution thereof this day made in probate court of Calhoun county. June 15th, 1869.

G. C. ELLIS,
Transferree of Claims.

Received of J. F. Grant, administrator of estate of S. P. Hudson, deceased, $31.50, in full of *pro rata* share of John S. Linton, as shown by the distribution of said estate this day made in the probate court of Calhoun county. June 15th, 1869.

G. C. ELLIS,
Transferree of Claims.

Filed in office this 12th day of May, 1869, and recorded July 20th, 1869.

A. WOODS,
Judge of Probate.

STATE OF ALABAMA, }
Calhoun County. }

I, Emmett F. Crook, judge of probate of said county, hereby certify that the foregoing papers numbered from 1 to 81 (1 to 41, as shown by this copy), inclusive, are true and — copies of the proceedings had in said estate taken from the records in this office, and that said pages are true and correct copies of said papers, proceedings, orders, and decrees, as the same appear of record in my said office. Given under my hand and the seal of said court this — day of September, 1869.

EMMETT F. CROOK,
Judge of Probate.

88 To the introduction in evidence of the said certified copy of the probate court record, offered by the defendants, the plaintiffs objected on the grounds—

1st. That said record shows on its face that there were minors interested in the estate of said Samuel P. Hudson, and fails to show that depositions were taken as in chancery proceedings, proving the necessity of the sale.

2nd. That said record shows on its face that there were minors interested in said estate and shows on its face also that witnesses were introduced to prove the necessity of the sale.

3rd. That the said record fails to show a valid decree authorizing the sale of the lands.

4th. That the record fails to show a decree or order of the probate court authorizing or directing the administrator or any other person to make a deed to the lands.

5th. That the said record fails to show a compliance by the purchaser with the terms of sale and fails also to show a decree or order of the probate court directing or authorizing the administrator to make a deed to the purchaser conveying the lands in controversy.

6th. That the said record is irrelevant and inadmissible as evidence in this case.

The court overruled this objection and each ground thereof, and to the judgment and action of the court in overruling said objection the plaintiff duly excepted. To the introduction in evidence of that part of the certified copy of the probate court records which purport to be depositions of L. W. Cannon and G. B. Douthit the plaintiffs objected on the grounds—

1st. Said depositions are no part of the record of the sale of said lands by the probate court.

2nd. Said depositions do not constitute a part of the record.

3rd. It is not shown that the depositions were introduced in evidence before the probate court or relied on by the court as furnishing proof of the necessity of the sale of the lands.

89 The court overruled this objection, and to the action of the court in so doing plaintiffs excepted.

To the introduction in evidence of that — of said record of the probate court, called a decree, directing or authorizing the sale of the lands in controversy the plaintiffs objected upon the grounds—

1st. That said record shows on its face (petition) that there were minors interested in the said estate, and the said decree of sale shows on its face that witnesses were introduced to prove the necessity of the sale and fails to show that proof was made of the necessity of the sale by depositions taken as in chancery proceedings.

2nd. That the said probate record shows on its face that there were minors interested in said estate and fails to show that depositions were taken as in chancery cases proving the necessity of the sale.

The court overruled plaintiffs' objection and each ground thereof and plaintiffs duly excepted. The defendants were then permitted against the objection and exception of plaintiffs to read the entire record of the probate court, including the decree of sale, to the jury, which was accordingly read in evidence by the defendants' counsel.

The defendants next offered in evidence a certified copy of a deed from J. F. Grant, administrator, to Kizia A. Hudson, which is in words and figures following, viz:

Whereas I, James F. Grant, administrator of all and singular the goods and chattels, rights, and credits of the estate of Samuel P. Hudson, deceased, did as said administrator apply — and obtain an order from the probate court of Calhoun county, State of Alabama, *for an order* to sell the real estate of which the said Samuel P. Hudson died seized and possessed, subject, however, to the widow of said deceased'- right of dower; and whereas said widow did apply to said court of probate to have dower allowed to her out of said lands, and prior to the time said sale was brought there was set off and allowed to Mrs. Kizia A. Hudson, widow of said deceased, the following lands, to wit:

90 The N. E. ¼ of section thirty-one, the N. E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ of section thirty-one; also the W. ½ of N. W. ¼ of section thirty-two; also the S. W. ¼ of S. W. ¼ of section twenty-nine; also the S. ½ of the S. E. ¼ of section thirty, all in township 15, range 8, Coosa land district, containing four hundred and eighty acres; and whereas I did on the 20th day of March, 1866, after having duly advertised the sale of said real estate in pursuance with the order of said court, expose to sale the remainder after termination of the doweress's right to the above-described lands, and said remaining interest in said described lands was bid off by Kezia A. Hudson at the sum of four hundred and fifty dollars, hers being the highest and best bid offered for the remainder in said described lands; and said sale having been by me, as said administrator, reported to said court of probate, and by said court in all things confirmed:

Now, know ye that, for and in consideration of the foregoing premises and the payment of the said sum of four hundred and

fifty dollars, to me in hand paid by the said Kezia A. Hudson, the receipt of which is hereby acknowledged, I, as such administrator, have this day bargained and sold, and do by these presents bargain, sell, and convey, unto the said Kezia A. Hudson, her heirs and assigns forever, all the remaining interest or right which there is of the said lands; to have and to hold to the said Kezia A. Hudson, her heirs and assigns forever, but I am in no event personally liable upon the covenants of this deed.

In witness whereof I have hereunto set my hand and affixed my seal this 9th day of April, A. D. 1866.

J. F. GRANT, [SEAL.]
Administrator of Samuel P. Hudson, Deceased.

Upon which deed are the following endorsements, to wit:

STATE OF ALABAMA, }
Calhoun County. }

I, Alexander Woods, judge of probate in and for said
91 county, hereby certify that J. F. Grant, administrator of the estate of S. P. Hudson, deceased, who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily as such administrator on the day the same bears date.

Given under my hand this 9th day of April, A. D. 1866.

A. WOODS,
Judge of Probate.

Filed in office April 9th, 1866, and recorded April 16th, 1866, and that the deed had on it fifty cents revenue stamps, this 16th day of April, A. D. 1866.

A. WOODS,
Judge of Probate.

THE STATE OF ALABAMA, }
Calhoun County. }

I, E. F. Crook, judge of the court of probate and *ex officio* clerk of said court, in and for said county and State, do hereby certify that the foregoing three pages, inclusive, contain a true and correct transcript of deed of J. F. Grant, administrator of estate of S. P. Hudson, deceased, to Kizia A. Hudson, as fully and as completely as appears of record in my office.

Given under my hand at office, in the town of Jacksonville, Alabama, on this the 15th day of August, A. D. 1888.

E. F. CROOK,
Judge of Probate and ex Officio Clerk of said Court, Calhoun County, Ala.

To the introduction of this deed from Grant, as administrator, to Mrs. Hudson the plaintiffs objected upon the grounds—

1st. That it is not shown that there was an order or decree of the probate court directing or authorizing the said grant to make such deed.

2nd. That the certified copy of the probate court records fails to show that the probate court ordered or authorized the deed to be made.

92 3rd. It is not shown that such deed was executed in pursuance of a decree or order of the probate court.

4th. That there has been no valid decree shown authorizing the sale of the lands.

The court overruled plaintiffs' objection and each ground thereof, and to the judgments and action of the court in overruling this objection plaintiffs excepted.

The defendants, being permitted by the court, then read the deed in evidence to the jury against the objection and exception of plaintiffs as aforesaid.

The foregoing being all the evidence, the defendants in writing requested the court to give the following charge in writing to the jury, viz:

"If the jury believe all the evidence, they must find the issues in favor of the defendants;" which charge was given by the court to the jury; to the giving of which the plaintiffs then and there duly excepted.

Plaintiffs tender this their bill of exceptions to the Hon. John Bruce, the judge before whom said cause was tried, in open court and in term time and which is signed by said judge in term time this March 25th, 1890, and made a part of the record in said cause.

JOHN BRUCE, *Judge.*

Endorsed: Filed in open court this 25th day of March, A. D. 1890. A. W. McCullough, clerk.

93 Know all men by these presents that we, Harriet A. Balkam, Gertrude Alexander, Adella Morris, J. D. Moore, are held and firmly bound unto the Woodstock Iron Company, the Anniston City Land Company, Cicero Roberts, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, Wm. J. Chappell, and John T. Butenshon in the full and just sum of five hundred dollars, to be paid to the said Woodstock Iron Company, the Anniston City Land Company, Cicero Roberts, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, Wm. J. Chappell, and John T. Butenshon, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of August, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States for the southern division of the northern district of Alabama, in a suit pending in said court between Harriet A. Balkam, Gertrude Alexander, and Adella Morris, plaintiffs, against The Woodstock Iron Company, The Anniston City Land Company, Cicero Roberts, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, William J. Chappel, and John T. Butenshon, defendants, a judgment was rendered against the said Harriet A. Balkam, Gertrude Alexander, and

Adella Morris, plaintiffs, and the said *said* Harriet A. Balkam, Gertrude Alexander, and Adella Morris having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Woodstock Iron Company, the Anniston City Land Company, Cicero Roberts, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, Wm. Chappel, and John T. Butenshon, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

94 Now, the condition of the above obligation is such that if the said Harriet A. Balkam, Gertrude Alexander, and Adella Morris shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

HARRIET A. BALKAM, [SEAL.]
By Her Attorney, J. A. W. Smith.
GERTRUDE ALEXANDER, [SEAL.]
By Her Attorney, J. A. W. Smith.
ADELLA MORRIS, [SEAL.]
By Her Attorney, J. A. W. Smith.
J. D. MOORE. [SEAL.]

Sealed and delivered in presence of—
H. W. COFFIN.

Approved by—
JOHN BRUCE, *Judge.*

Filed in clerk's office September 1st, 1890.
A. W. McCULLOUGH, *Clerk.*

95 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Woodstock Iron Company, the Anniston City Land Company, Cicero Roberts, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, Wm. J. Chappel, and John T. Butenshon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern division of the northern district of Alabama, wherein Harriett A. Balkam, Gertrude Alexander, and Adella Morris are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 1st day of September, in the year of our Lord one thousand eight hundred and ninety.

[Seal Circuit Court U. S., Sou. Div., N. D. of Ala.]

JOHN BRUCE, *Judge.*

96 We accept due and legal service of the within citation and waive copy. Sept. 2nd, 1890.

BROTHERS, WILLETT & WILLETT,
JOHN B. KNOX,
JOHN M. CALDWELL,
W. F. JOHNSTON, AND
D. C. BLACKWELL,
Att'ys for Defendants.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Harriett A. Balkam, Gertrude Alexander, and Adella Morris, plaintiffs, against The Woodstock Iron Company, The Anniston City Land Company, Cicero Roberts, F. M. Hight, John A. Fry, Ed. Farmer, Felix Hunter, William J. Chappel, and John T. Butenshon, a manifest error hath happened, to the great damage of the said Harriett A. Balkam, Gertrude Alexander, and Adella Morris, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of September, in the year of our Lord one thousand eight hundred and ninety.

Seal Circuit Court U. S., Sou. Div., N. D. of Ala.

A. W. McCULLOUGH,
Clerk of the Circuit Court of the United States, Sou. Div., Nor. Dist. of Alabama.

Allowed by—
JOHN BRUCE, *Judge.*

98 I hereby certify that a copy of this writ of error has been lodged in my office for the benefit of the defendants in this cause this first day of September, A. D. 1890.

A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Sou. Div., Nor. Dist. Alabama.

UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

I, A. W. McCullough, clerk of the circuit court of the United States of America in and for said division of said district, do hereby certify that the following is a true, full, and complete copy of all proceedings had in this court in case No. 110, Harriett A. Balkam *et al. vs.* The Woodstock Iron Co. *et al.*, and case No. 111, Harriett A. Balkam *et al. vs.* F. M. Hight *et al.*, together with the original citation and original writ of error as fully as the same does appear of record in my office.

Seal Circuit Court U. S., Sou. Div., N. D. of Ala.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at office, in the city of Birmingham, in said district, this 9th day of October, A. D. 1890.

A. W. McCULLOUGH,
Clerk of the U. S. Circuit Court.

99 HARRIET A. BALKAM *et al.* *vs.* THE WOODSTOCK IRON COMPANY *et al.* } Cause Pending in the Supreme Court of the United States.

Come the plaintiffs in error, Harriet A. Balkam, Gertrude Alaxander, and Adella Morris, by their attorney, David D. Smith, and say there is manifest error in the judgment and proceedings of the lower court in this:

1st. The court below erred in overruling plaintiffs' objection to the introduction in evidence of the probate court record, offered by the defendants.

2nd. The court below erred in overruling plaintiffs' objection to the introduction in evidence of that part of the certified copy from the record of the probate court which purports to be the depositions of L. W. Cannon and G. B. Douthit.

3rd. The court below erred in overruling plaintiffs' objection to the introduction in evidence of that part of the record of the probate court called a decree authorizing a sale of the land in controversy.

4th. The court below erred in overruling plaintiffs' objection to the introduction in evidence of the deed made by J. F. Grant to Kezia A. Hudson.

5th. The court below erred in charging the jury at the request of the defendant as follows: "If the jury believe all the evidence, they must find the issues in favor of the defendants." Wherefore the

said plaintiffs in error ask the judgment of the Supreme Court, and that the said judgment of the said court below be reversed and annulled, and that said cause be remanded to the court below, the said circuit court of the United States for the southern division of the northern district of Alabama, that further proceedings may be had, and that justice may be done in the premises.

DAVID D. SMITH,
Attorney for Plaintiffs in Error.

Endorsed on cover: Case No. 14,379. N. Alabama C. C. U. S. No. 329. Harriett A. Balkam, Gertrude Alexander, and Adella Morris, plaintiffs in error, *vs.* The Woodstock Iron Company, The Anniston City Land Company, *et al.* Filed October 24, 1890.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

CASE NO. 14,379.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HARRIET A. BALKAM, ET AL,
vs.
THE WOODSTOCK IRON CO., ET AL.
Term No. 329.

BRIEF AND ARGUMENT OF J. A. W. SMITH, Attorney for the Plaintiffs in Error.

ROBERTS & SON, PRINTERS, BIRMINGHAM.

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} Term No. 329.

BRIEF AND ARGUMENT OF J. A. W. SMITH, Attorney for the Plaintiffs in Error.

THE FACTS OF THE CASE.

The plaintiffs in error, who are citizens of the State of Texas, were also plaintiffs in the lower court. The action was a statutory proceeding in the nature of an ejectment suit for the recovery of the lands mentioned in the complaint. Two suits were brought, but were consolidated before the trial.

As a defense to the suit, the defendants relied on the statute of limitations, also upon certain void probate court proceedings, and what they call "the broad doctrine of prescription," which they claim has been established by the decisions of the supreme court of Alabama.

Plaintiffs, joined with Mrs. Fullenwider, brought a similar suit to the one brought here by the writ of error, in the State court, on the 28th day of June, 1887, which was decided adversely to them by the supreme court of Alabama.

See record, page 11. The opinion of the State supreme court is reported in 87 Ala., p. 584.

THE PLAINTIFFS' evidence showed that Samuel P. Hudson is the common source of title, and that he died, intestate, August, 1863, seized and possessed of the lands sued for, in connection with other contiguous lands; that at his death said Samuel P. Hudson left surviving him his widow, Kezia A. Hudson; that said Samuel P. Hudson resided on the lands in controversy from 1858 up to the time of his death in 1863, and that his wife, Kezia A. Hudson, and the other members of the family continued to reside on the said lands, and used and occupied the same as a home and farm until the spring of 1869, when she, with her family, moved to Jacksonville, some ten miles distant; that the widow, Kezia A. Hudson, died June 26th, 1879.

It is also agreed that the plaintiffs' evidence will show that the plaintiffs are the only heirs-at-law of the said Samuel P. Hudson, deceased (except Mrs. Francis M. Fullenwider, a daughter of the said Hudson), and were his only heirs (excepting Mrs. Fullenwider, who is also an heir), June 1, 1887; and that Francis M. Fullenwider is his daughter, and was born August 3, 1845; that Harriet A. Balkam is his daughter, and was born November 13, 1853; that Gertrude Alexander

is his daughter, and was born October 2, 1856; that Adella Morris is his grand-daughter, and was born April 10, 1867, and is the only child of Adella Van Hagan, who was the daughter of said Samuel P. Hudson, and who was born June 14, 1847, and died April 28, 1867; that Harriet A. Balkam, Gertrude Alexander, and Adella Morris were citizens of the State of Texas when each of said suits were brought, are now citizens of the State of Texas, and have been for several years.

It is also agreed that the plaintiffs' evidence will show that the ten (10) acres sued for, lying and being in the southeast corner of the southwest quarter (S.W. ¼) of the southeast quarter (S. E. ¼) of section thirty-one (31), is worth eleven hundred ($1,100.00) dollars per acre; that the other lands included in said suit are worth five hundred ($500.00) dollars per acre, and that said lands were worth so much when said suits were brought; that neither the defendants nor those under whom they hold have put any permanent improvements on said lands, except on the ten (10) acres in the southeast corner of the southwest quarter (S. W. ¼) of the southeast quarter (S. E. ¼) of section thirty-one (31), and that the improvements on said ten (10) acres are worth about one thousand ($1,000.00) dollars, and were put on the lands in 1887 and 1888.

It is also agreed that the plaintiffs' evidence will show that an action similar to those above stated was brought by the plaintiffs in the said several suits stated, against the defendants therein on June 28, 1887, for the recovery of the lands involved in the said several suits in the circuit court of Calhoun county, Alabama, and that judgment was rendered therein for the plaintiffs for the lands involved in this controversy, except as to the ten (10) acres in the southeast corner of the southwest quarter (S. W. ¼) of the southeast quarter (S. E. ¼) of section thirty-one (31), which

has never been tried in said circuit court, and that such judgment was reversed, on appeal, by the supreme court of Alabama on May 28, 1889, and judgment rendered for defendants by said supreme court, and judgment was rendered against the plaintiffs for two hundred and fifty-four dollars and twenty-five cents ($254.25), costs, which was still in force and not satisfied at the time of the trial in the lower court.

Record, pp. 10, 11.

Plaintiffs' evidence also showed that the lands in suit were duly allotted to Kezia A. Hudson, the widow of said Samuel P. Hudson, by regular and valid proceedings in the probate court of Calhoun county, Alabama, as her dower, on the 9th day of February, 1866, thus creating in her a life estate in the lands in controversy.

See record, pp. 11 to 18 inclusive.

This is also shown by the transcript of the probate court record introduced in evidence by the defendants.

See record, pp. 27 to 34 inclusive.

THE DEFENDANTS' evidence showed: That Samuel P. Hudson died in 1863, seized and possessed of the land sued for, and that he was the common source of title; that on the 20th day of March, 1866, James F. Grant, the administrator of Samuel P. Hudson's estate, under an order of the probate court for the sale of the lands of said estate, after advertising the time, terms, and place of sale as required by said order, proceeded to sell the reversionary interest of the heirs of Samuel P. Hudson in and to the said lands in controversy at public outcry on the premises, together with other lands of the said estate, subject to the widow's dower, and at said sale Kezia A. Hudson, widow of the said Samuel P. Hudson, deceased, purchased the said reversionary interest in and to the said lands in controversy in this suit, as set

forth in the report of said sale, for the sum of four hundred and fifty ($450.00) dollars, which amount she paid the administrator in cash.

See record, pp. 18, 19.

Plaintiffs, at the time of making the agreement as to the said sale, reserved the right to object to the validity of such sale as affecting their rights and as evidence showing a divestiture of their title.

Record, p. 19.

Defendants' evidence also showed: That the said Kezia A. Hudson held possession of the land in controversy from the date of said sale by said administrator, claiming to hold the same under said purchase and conveyance of said lands by said administrator, and in her own right, till she sold the same to Sherman & Boynton, in the spring of 1869, when she surrendered possession to them, and afterwards, on the 28th day of October, 1869, made a deed of conveyance to them in the usual form of such conveyances to said property; that Sherman & Boynton went into possession of the lands in controversy on the day of their purchase and continued in possession, holding and claiming the same as their own, until they sold the same to H. L. Jeffers, December 10, 1872, who went into possession and held in a like manner until he sold and conveyed the same to the Woodstock Iron Company, one of the defendants, June 24, 1874; that said Woodstock Iron Company went into possession thereof on the day of its purchase as aforesaid, holding and claiming the same in a like manner until the present time, except as to the lands in the corporate limits of Anniston, which said land was sold and conveyed by the said Woodstock Iron Company to the Anniston Land and Improvement Company, May 22, 1884, and by this company sold and conveyed to the Anniston City Land Company on the 8th day of June, 1887. The Anniston Land and Improvement

Company went into possession of said land under its purchase, claiming to own the same in a like manner above stated, and so the Anniston City Land Company after its purchase. That the several deeds above recited, from Mrs. Hudson to Sherman & Boynton, from Sherman & Boynton to Jeffers, and from Jeffers to the Woodstock Iron Company, and the Woodstock Iron Company to the Anniston Land and Improvement Company, and the Anniston Land and Improvement Company to the Anniston City Land Company, are in the usual form of warranty deeds in fee simple and were duly recorded.

That the administrator, James F. Grant, and the probate judge, Alexander Woods, who was the probate judge during the administration of the estate of Samuel P. Hudson, are both dead; that said Grant died in 1878 and said Woods died in 1887.

That the lands in controversy are within and adjoining the corporate limits of the city of Anniston and are near to and adjoining lands on which defendants have expended large sums of money, amounting to several hundred thousand dollars, which improvements and expenditures of monies have greatly enhanced the value of the lands in suit; and a number of other parties have spent large sums of money on adjoining lands in the city of Anniston and made permanent improvements thereon, which have aided materially in enhancing the value of the lands in controversy; that defendants have laid out the city of Anniston and were original owners of most of the land upon which said city is built, but no public or permanent improvements have been made on the Hudson lands, except the building of a street car line on a portion of the ten acre tract.

Record, pp. 19, 20.

Some mention is made in the agreement as to what the defendants' evidence would show, as to the introduction of

probate court records, deeds, etc., but plaintiff therein reserved the right to object to them as evidence affecting their title.

The defendants next introduced in evidence, against plaintiffs' objection, a certified transcript from the probate court records of Calhoun county, Alabama, in regard to the administration of the estate of Samuel P. Hudson, deceased.

As the court proceedings describing the lands in controversy and the administrator's deed constituted color of title, such evidence was proper for the purpose of showing the boundaries of the land occupied by the defendants, but should have been restricted to such purpose. On the question as to the validity of these proceedings and the administrator's deed, as affecting plaintiffs' title independent of the statute of limitations, the authorities are uniform, that they are absolutely void and do not pass the title to the land.

ERRORS ASSIGNED.

Plaintiffs in error excepted, upon the trial of the cause in the lower court, to the action of the court in permitting counsel for defendants to read in evidence the transcript of the record of the probate court of Calhoun county, Alabama (record, pp. 20-61), and certain parts of said transcript, and here assigns such action of the court below as error.

The grounds of objection were as follows:

1st. That the record shows on its face that there were minors interested in the estate of Samuel P. Hudson, and fails to show that depositions were taken, as in chancery proceedings, proving the necessity of the sale.

2d. That said record shows on its face that there were minors interested in said estate and shows on its face also that witnesses were introduced to prove the necessity of the sale.

3d. That said record fails to show a valid decree authorizing the sale of the lands.

4th. That the record fails to show a decree or order of the probate court authorizing or directing the administrator or any other person to make a deed to the lands.

5th. That the record fails to show a compliance by the purchaser with the terms of sale and fails also to show a decree or order of the probate court directing or authorizing the administrator to make a deed to the purchaser conveying the lands in controversy.

6th. That the record is irrelevant and inadmissible as evidence in this case.

See record, page 61.

To the introduction of that part of the said transcript which purports to be the depositions of L. W. Cannon (record, p. 26) and G. B. Douthit (record, p. 27) the grounds of objection were as follows:

1st. Said depositions are no part of the record of the sale of said lands by the probate court.

2d. Said depositions do not constitute a part of the record.

3d. It is not shown that the depositions were introduced in evidence before the probate court or relied on by the court as furnishing proof of the necessity of the sale of the lands.

See record, page 61.

To the introduction of that part of the transcript called a decree (pages 34, 35) the following grounds of objection were interposed:

1st. That said record shows on its face (petition) that there were minors interested in the said estate, and the said decree of sale shows on its face that witnesses were introduced to prove the necessity of the sale and fails to show that proof

was made of the necessity of the sale by depositions taken as in chancery proceedings.

2d. That the said probate record shows on its face that there were minors interested in said estate and fails to show that depositions were taken, as in chancery cases, proving the necessity of the sale.

Record, page 62.

Plaintiffs also excepted to the introduction in evidence of the deed from the administrator to Kezia A. Hudson (record, page 62) and assigns the action of the court in overruling plaintiffs' said objection, as error. The grounds of objection were:

1st. That it is not shown that there was an order or decree of the probate court directing or authorizing the said Grant to make such a deed.

2d. That the certified copy of the probate court records fails to show that the probate court ordered or authorized the deed to be made.

3d. It is not shown that such deed was executed in pursuance of a decree or order of the probate court.

4th. That there has been no valid decree shown authorizing the sale of the lands.

Record, pages 63, 64.

Plaintiffs also excepted to the action of the court in giving the following instruction to the jury; and which is also here assigned as error:

"If the jury believe all the evidence, they must find the issues in favor of the defendants."

Record, page 64.

These assignments of error are also attached to the transcript of the record (page 67).

ARGUMENT.

This being a statutory suit in the nature of an action of ejectment, the *legal title* must prevail.

Allen vs. Kellum, 69 Ala., 442.
Standifer vs. Swann and Billups, 78 Ala., 88.
Hooper vs. C. & W. Ry. Co., 78 Ala., 813.
Redfield vs. Parks, 132 U. S., 239.

It was agreed that plaintiffs' evidence would show (see record, page 10) that Samuel P. Hudson was the common source of title, and that he died in 1863, seized and possessed of the lands in controversy, and that the plaintiffs are his heirs at law and are citizens of Texas. This evidence made a *prima facia* case for the plaintiffs, and, unless it was overturned on the trial, a verdict should have been directed in their favor for an undivided three fourths interest in the lands.

Ware vs. Dewberry, 84 Ala., 568.
Pendly vs. Maddison, 83 Ala., 484.

The record in this case shows that a former action by plaintiffs was decided by the supreme court of Alabama in favor of the defendants, but that judgment is not pleaded in bar, neither is it a bar to this action.

Jones vs. DeGraffenreid, 60 Ala., 152.
Gibson vs. Lyon, 115 U. S., 439.

It may be conceded that it was proper to admit in evidence the probate court proceedings and the administrator's deed as *color* of title. Plaintiffs contend that such proceedings and such deed are insufficient *to pass the title* of Samuel P. Hudson, or of plaintiffs as his heirs at law, and will undertake to show that, being insufficient for such purpose, they cannot

aid the possession of the occupants in effecting a bar to plaintiffs' right of entry on the termination of the life estate. This whole question is raised by the exception reserved by plaintiffs to the charge of the court to the jury, instructing them that: "If the jury believe all the evidence, they must find the issues in favor of the defendants."

Probate Court Proceedings.

In regard to sales of land, courts of probate in Alabama are courts of *limited jurisdiction*, and no fact necessary to the validity of such sales will be presumed, but must appear *affirmatively* of record.

Robertson vs. Bradford, 70 Ala., 385.

The general rule is, that the proceedings of courts of limited jurisdiction are not subject to collateral attack for any irregularity in the proceedings after the court has once acquired jurisdiction over the subject matter. Although there are cases holding a similar petition to that filed by Hudson's administrator, so defective as to confer no jurisdiction on the court (see Abernathy vs. O'Riely, 90 Ala., 495, a case decided since the writ of error was sued out, but which has since been overruled), yet our contention that the sale of the lands is void, is not predicated upon this ground. It is conceded that the petition is sufficient to confer jurisdiction in the first instance. Our contention is that, minors being interested, the sale is absolutely void because of the failure of the record of the probate court to show upon its face that depositions were taken, as in chancery cases, proving the necessity of the sale. This is because it is so provided by statute.

The fifth section of the act of the General Assembly of Alabama of February 7, 1854, provides:

"No order for the sale of land belonging to any estate shall be made, when there are minors, or persons of unsound mind, interested in such estate, unless the probate court shall have taken proof by deposition, as in chancery cases, *showing the necessity of the sale;* and this *proof* shall be taken, whether the allegations in the petition are denied or not by the guardian, or other person appointed by the court to represent the minors or persons of unsound mind; *and any order of sale made without a compliance with the requisitions of this act shall be wholly void.*"

See Satcher vs. Satcher, 41 Ala., 42.

In Pettus vs. McClannahan, 52 Ala., p. 59, Chief Justice Brickell said:

"Prior to the statute of February 7, 1854, which now forms §§ 2224-5 of the Code, the absence of such proof (by depositions, as in chancery cases, showing the necessity of the sale), though expressly required, was an irregularity not affecting the validity of the decree of sale when collaterally assailed. The jurisdiction having attached on the filing of the petition, the omission to take the proof of the fact by deposition, as in chancery proceedings, was an error, an irregularity occurring in the exercise of jurisdiction. Field vs. Goldsby, 28 Ala., 218; Satcher vs. Satcher, *supra.* The effect of the statute of 1854 is, when the proceeding is for the sale of lands descended to an infant, or person of unsound mind, *to convert this error or irregularity into a defect which vitiates the decree of sale, as absolutely as an excess or usurpation of jurisdiction.*"

Bland vs. Bowie, 53 Ala., 152.
Robertson vs. Bradford, 70 Ala., 385.
Goodwin vs. Sims, 86 Ala., 102.

In order to obviate this objection to the order of sale, counsel for defendants introduced in evidence, against the objection of plaintiffs, the depositions of L. W. Cannon and G. B. Douthit, which were on file in the probate court (see record,

pp. 26, 27), as a part of the transcript from the probate court records. Numerous decisions of the supreme court of Alabama hold, that depositions, or other *written evidence* found in a record, but *not referred to by recital* in the order of sale or other judgment entry, constitutes *no part of the record, and cannot be looked to for any purpose.*

Bland vs. Bowie, 53 Ala., 152.
Goodwin vs. Sims, 86 Ala., 102.
Hood vs. Disston, 83 Ala., 331.
Pinney vs. Werborn, 72 Ala., 62.
Gregory vs. Tabor, 79 Am. Dec., 219.

The order of sale recites (record, page 35):

"And comes the said Grant (the administrator) and prays that his said petition and application for the sale of the above described land be heard and determined at this term of the court, and it appearing to the satisfaction of the court that notice of the filing of said petition and of the day set for the hearing of the same has been given according to law, and thereupon the court proceeds to hear and determine upon the facts of the said petition; and comes into court L. W. Cannon, as the guardian of the said minor heirs of said decedent, and denies each and all of the allegations of said petition, and thereupon *said administrator introduces* WITNESSES *to sustain the same, and, after hearing all the testimony in the case, the court is of opinion that the allegations of the petition are fully sustained by the evidence in the case.* It is therefore ordered and decreed by the court that the above described lands, as belonging to said estate, be, and the same are hereby, directed to be sold for the payment of the debts of said estate, subject, however, to the widow's dower interest in said lands."

From the foregoing recitals in the order of sale, it is clear that the probate court did not determine from any depositions,

taken as in chancery cases, that a necessity existed for the sale of the land, but its judgment is based upon the "testimony" of "witnesses." It would not be sufficient, in order to sustain the validity of the order, that the probate court should have decided from depositions *and* the testimony of witnesses that a necessity existed for the sale of the lands. There is nothing in the record to show that the depositions accompanying the record were ever called to the attention of the probate court.

It devolved on the probate court to ascertain the jurisdictional fact that depositions were taken proving the necessity of the sale.

Bland vs. Bowie, 53 Ala., 152.
Goodwin vs. Sims, 86 Ala., 102.

Did the probate court ascertain that such depositions were taken, and that, being taken, *they* furnished proof of the necessity of the sale? The decree of the court (order of sale, record, pp. 34-36) *fails* to recite that such proof was made *by depositions*, and this failure of the record to show this jurisdictional fact renders the order of sale void.

Authorities *supra*.

ADMINISTRATOR'S DEED.

The administrator's deed to Mrs. Hudson (record, pages 62, 63) did not pass the title of the decedent, nor of plaintiffs, as his heirs, because the order of sale was invalid, for the reasons before stated. Besides, the records of the probate court *fail* to show that *an order was made by the court directing or authorizing the administrator to make such deed.* "In the *absence* of evidence that there has been a decree of the court authorizing a conveyance to the purchaser, and a con-

veyance executed *in pursuance of such decree*, the appellants were entitled to recover on their legal title."

Doe vs. Hardy, 52 Ala., 297.
Wallace vs. Hall, 19 Ala., 367.

We think it clear, for the reasons before stated, that the probate court proceedings were void and that no title passed thereby. They were so treated by the lower court, and by the supreme court of Alabama in the case of Woodstock Iron Company vs. Fullenwider, 87 Ala., 584. (Opinion of the lower Court is reported in 43 Federal Reporter 646

STATUTE OF LIMITATIONS.

The following statutes appear in chapter II, Code of Alabama, 1886:

"2612 (3223) (Same as 2474, Code 1852.) LIMITATIONS OF ACTIONS.—Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2614 (3225) (Same as section 2476, Code 1852.) LIMITATION OF TEN YEARS.—Within Ten Years.—1. * * * * *

"2. Actions for the recovery of lands, tenements, hereditaments, or the possession thereof, except as herein otherwise provided."

"2634 (3236) (Same as 2496, Code 1852.) ADDITIONAL TIME ALLOWED INFANTS, ETC.—If any one entitled to bring the actions enumerated in this chapter, or make an entry on land, or defense founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, or a married woman, or insane, or imprisoned on a criminal charge for any term less than for life, he or she shall have three years after the termination of such disability to bring suit, or make entry or defense; but no disability shall extend the period of limitation so as to allow such action to be commenced, or entry or defense made, after the lapse of twenty years from the time the cause of action or right accrued; nor shall this exception extend to a married woman in respect to her separate estate."

It would seem sufficient, in order to take this case out of the operation of the bar of the statute, to simply state the facts, viz: That neither Mrs. Hudson nor any other person set up any adverse claim to the lands until after dower had been allotted her, thus creating in her a life estate, and that she died within ten years of the commencement of this action.

Jackson vs. Schoonmaker, 4 Johns, 402.

Pickett vs. Pope, 74 Ala., 122.

But, since the court below, and the supreme court of Alabama, in the case of Woodstock Iron Company vs. Fullenwider (87 Ala., 584) both decided the case adversely to the plaintiffs solely upon the ground of their *delay* in bringing their suit, we call the attention of the court to numerous authorities bearing upon the question of the time within which a remainderman may bring ejectment.

The statute *in terms* provides that civil suits for the recovery of land may be commenced within ten years "after the cause of action has accrued."

The statute is plain and needs no construction. The lower court and the State court simply did not give it any effect.

If the statute needed the aid of judicial sanction, however, to give it effect, a stronger case could not be cited than the case of Pickett vs. Pope, 74 Ala., 122. See, also, Zeller vs. Eckert, 4 Howard, 297; Pendley vs. Maddison, 83 Ala., 484.

The agreement of counsel in this case shows that Mrs. Hudson, together *with plaintiffs*, her children, continued in possession after the death of her husband in 1863 (record, p. 10), but, if it be admitted that the administrator was in possession, his possession could not be adverse to plaintiffs, as Hudson's heirs.

Hart vs. Kendall, 82 Ala., 144.

Baker vs. Barcliff, 76 Ala., 414.

The possession of Mrs. Hudson before the assignment of dower to her was rightful and not adverse.

Shelton vs. Carroll, 16 Ala., 148.

So these plaintiffs had no cause of action before dower was assigned the widow, in 1866. They were with her on the land before, and some time after, the allotment of dower. (See record, p. 10.) Dower was assigned her February 9, 1866 (record, pp. 17-18), and she did not claim as purchaser until March 20, of the same year. She sold the land in 1869, and afterwards abandoned possession and defendants' grantors entered. But these facts did not give plaintiffs any cause of action or right of entry upon the land. In Burns vs. Hedrick, 85 Tenn., it was held that, after dower is assigned possession cannot be adverse to the remainderman. In 13 Am. & Eng. Encyclopedia of Law, page 720, it is said: "A cause of action does not accrue in favor of a remainderman, or the statute begin to run against him, until the termination of the preceding estate." The preceding estate in this case terminated when the life tenant died, June 26, 1879—within ten years of the commencement of this action. In Pickett vs. Pope, 74 Ala., 122, it was held that the *possession* of a life tenant and her vendees could not be *adverse* to the remainderman, and that the statute did not begin to run before the death of the life tenant.

Counsel for defendants have never contended that plaintiffs were barred by the statute of limitations, of *ten* years; but the contention is, that they are barred under what they term the "broad doctrine of prescription."

PRESCRIPTION.

"In pursuing the inquiry whether the law authorizes the presumption of a grant under these circumstances, we must

begin with the recognition of the rule that every presumption is in favor of possession in subordination to the title of the true owner. Lawson on Presumptive Evidence, 414; Jackson vs. Sharpe, 9 Johns, 163; Rung vs. Shoemaker, 2 Watts, 23. Next, we come to the propositions established by Ricard vs. Williams *et al*, 7 Wheaton, 59, universally recognized as a leading case, where Justice Story, speaking for the supreme court of the United States, says that the presumption of a grant can never arise where all the circumstances are perfectly consistent with the non-existence of a grant, nor where the claim is of such a nature as is at variance with the supposition of a grant; also, that it is limited in general to periods analagous to those of the statute of limitations in cases where the statute does not apply, and that where the statute does apply, it constitutes, ordinarily a sufficient title or defense, independent of any presumption of a grant, and therefore the presumption is not generally resorted to."

McCloskey *et al* vs. Barr *et al*, 47 Fed. Rep., 154.

McCorry vs. King, 39 Am. Dec., 173 (3 Hump., 267).

Pickett vs. Pope, 74 Ala., 122.

Admitting, for the sake of argument, that a prescriptive right to the possession of land may be acquired, then it becomes necessary to determine *what character of possession*, and for what length of time it must continue before the right becomes absolute. In Pickett vs. Pope, 74 Ala., page 122, it was held that *the possession* of a life tenant and her vendees *could not be adverse* to the remainderman, so as to put the statute of limitations in operation. The same principle was conceded in the case of Woodstock Iron Company vs. Fullenwider, 87 Ala., 584. All the authorities show that the *same character of possession* is necessary to authorize the presumption of a grant that is required to effect a bar under the statute of limitations. Says Judge Stone, in Polley vs. McCall, 37

Ala., on page 29: A *user*, "if continued by actual *adverse* enjoyment for a period corresponding with that which is prescribed in the statute of limitations in reference to the right of entry upon land, will confer an absolute right."

Stein vs. Burden, 34 Ala., 148.

Askew vs. Hooper, 26 Ala., 634.

But this is true only when "there has been *a possession hostile to the* TITLE the complainant asserts" (Shorter vs. Smith, 56 Ala., 210), and "during every moment of which time *the right* could have been asserted, for the destruction of which the presumption is invoked."

Ross vs. Goodwin, 88 Ala., 396.

In the case at bar *the right asserted* is the right to the *possession* of the land. *That right* did not exist in plaintiffs till the death of the life tenant, which occurred less than ten years before this suit was brought, and it is that right, *i. e., the right to enter into possession of the land*, that defendants seek to destroy by invoking the doctrine of prescription. Defendants' hostile *claim*, in the absence of a hostile *possession*, did not operate to *disseize or oust* the plaintiffs of the possession to the remainder interest in the land which the *law* casts upon them by reason of their title, there being no adverse possession of such interest.

Pickett vs Pope, 74 Ala., 122.

In Arnold vs. Stevens, 35 Am. Dec., on page 308 (24 Pick., 106), it is said by Morton, J.: "So a grant of land may be presumed, as well as a grant of an easement. But, in all cases, *the possession*, to raise any, even the slightest, presumption, must be *adverse*. It must be under claim of right, and contrary to the interests of the owner. An enjoyment with the consent, or consistently with the rights of the true owner, has no tendency to prove a conveyance from him. * * * *

If the possession can be accounted for consistently with the title, no presumption arises."

See, also, Burbank vs. Fay, 65 N. Y., 65.
Turner vs. Hart, 15 Am. St., 243.
Edson vs. Monsell, 10 Allen, 568.
Rountree vs. Brantley, 34 Ala., 544.
Steel vs. Sullivan, 70 Ala., 595.
Kirk vs. Smith, 9 Wheat, 288.

In Jackson vs. Schoonmaker, 4 Johns, 402, it is said by Kent, C. J., that the statute of limitations will not affect the right of a remainderman to enter "if a particular estate existed at the time of the dissezen, or when the adverse possession began, because a right of entry in the remainderman cannot exist during the existence of the particular estate; and the *laches* of a tenant for life will not affect the party entitled." So, under the principle of that case, it matters not whether the defendants in the case at bar have been holding or claiming under the life tenant or from some other source, it is agreed that no adverse *claim* was set up by the life tenant (or by any one else) to the land until her *attempted* purchase from the administrator, which was *subsequent to* the creation of the life estate. She afterwards became disseized, but no disseizen of the life tenant could affect plaintiffs' right of entry on the termination of the particular estate.

Thompson vs. Simpson, 128 N. Y., 270.
Zeller vs. Eckert, 4 Howard, 297.
Jackson vs. Johnson, 5 Cowan, 74.
Jackson vs. Mancius, 2 Wend., 369.
Tilson vs. Thompson, 10 Pick., 362.
Mettler vs. Miller, 129 Ill., 630.
Butler vs. McMillan, 11 S. W. R., 362.

In McCorry vs. King's Heirs, 39 Am. Dec., on page 178 (6 Hump., 267), it is said: "Where the circumstances of the case, the relation of the parties toward each other, or the condition of the title, obviate and repel the bar of the statute (in this case the condition of the title obviates and repels the bar), we think it would be wrong in principle and unsupported by precedent to protect the possession by giving effect to the doctrine of presumption insisted on. It would operate, moreover, most unjustly. A tenant in dower might alien the fee (as was done in this case) and live for sixty years afterwards. The heir could not enter during her life, and the statute would not operate in favor of the alienee, until seven (ten in Alabama) years had elapsed after the death of the tenant in dower. Yet, if the doctrine of presumption was applied to the case, the alienee would have a good title in fee, not from the deed he had taken, but by another, presumed in his favor, for more than twenty years before the death of the dowress. The truth is, the doctrine of presumption, as well as the bar created by the policy of the statute, is founded upon the principle of *laches* in him who, having the right, power, and capacity to sue and disturb or recover possession, for a long time omits and neglects to do so. This doctrine, under such circumstances, to secure the repose of society, presumes at length that he who could and would not sue had parted with his right. But to presume against him who is unable to sue, whose right of action has not accrued, who has been guilty of no *laches*, that his title has passed from him or from those under whom he claims, would be an application of the doctrine of presumption as novel, we think, as it would be mischievous."

In Orthwein vs. Thomas, 11 Am. St. Rep., on page 169 (127 Ill., 554) where one source of the occupant's title was *an ancient void chancery sale*, Shope, J., used the following lan-

guage: "The whole force of the argument of the village in support of the defense of *laches* is spent in pressing on our attention the fact that during all the years intervening between the death of Susannah Osborn and the filing of appellant's cross bill, her heirs, and those claiming through them, remained silent. From her death, in 1832, down to the death of her husband, in June, 1863 (thirty years and eight months), this is certainly true. During all that time, however, they could neither speak nor act. The right of possession was in their father and his grantees, and their right of entry had not accrued, and it was only upon the termination of the intermediate life estate that they were required to speak or act—nor then, as we have seen, until their rights were attacked or invaded. No word spoken or act performed by Thomas Osborn, or those claiming under him, during the existence of his life estate, could in the least affect the rights of those entitled to the possession upon the termination of his estate. True, Osborn and his immediate grantees, in 1837, and following the forms of law, laid out and platted a town upon survey No. 764; but it was impossible that he should grant or convey thereby any greater interest in the land than he possessed. The possession of the streets and alleys of the town by the corporation, during Osborn's life, was in no sense adverse or hostile to those entitled to the possession of the lands on the termination of the life estate. And this is so, for the obvious reason that, pending the right of entry and of possession of the fee owners, the possession of the life tenant and his grantees was lawful, and could by no legal possibility become hostile or adverse until the life estate was determined."

In Pickett vs. Pope, 74 Ala., 122, the occupant had been in possession, under a warranty deed from the life tenant, for over twenty years. Judge Somerville, in that case, says (on page 129): "It is contended by appellant's counsel that this

court is committed to the view that one who claims a full title to property under a deed purporting to be a conveyance of the perfect title by the tenant for life, holds adversely to the remainderman."

The same contention is made in the case at bar, with the slight additional fact that the life tenant in this case *attempted* to get the title to the *reversion* before she conveyed, but failed.

The contention in the case of Pickett vs. Pope was disposed of in the following pointed language (see page 130): "No sale of it (real property) by a life tenant can in any manner affect or change the nature or *status* of the estate in remainder. It is the effect of our statutes now, and was so at the time the various deeds were made to the property in controversy, that a conveyance made by a tenant for life, purporting to convey a greater interest than he owns, does not work a forfeiture of his estate, but passes to the grantee the property and *possession* of the grantor, all warrantees by him being declared void as against the remainderman. Code 1876, §§ 2192, 2196; Code 1852, §§ 1813, 1817; Clay's Dig., 156, §§ 30, 35; Aiken's Dig., 94, §§ 32, 37; Pope vs. Pickett, 65 Ala., 497. There can be no possible dealing with the remainder, by the tenant for life of real estate, which can operate to discontinue it or change it into a chose in action. * * * *

"Adverse *possession*, it will be thus seen, is something more than a mere possession accompanied with hostile claim of ownership. It is very true that ordinarily an actual occupancy of lands, accompanied with an open, notorious and uninterrupted claim of ownership, with intention to claim hostile to the title of the real owner, constitutes adverse possession. But this is so only where the possession of the occupying claimant is hostile to the claim or right of *possession* of some one else. If there be no other person entitled to present

possession, there can be no repugnancy, actual or constructive, between the mere possession of the occupant and the rights of any one else. A possession to be *adverse*, must, in other words, operate to *disseize* or *oust*, some other claimant of his possession or right of possession. (Citing authorities.) Hence, an adverse possession has been defined to be, an occupancy which disclaims the title of the *negligent* owner. (Citing authorities.) It need not, of course, be actual, so as to partake of the nature of physical force, but may as well be a constructive disseizen or ouster. But, whether the one or the other, any possession, to be adverse, must be *wrongful* as against some one who claims to be or is legally entitled to the possession. It must be an act so far operating to the prejudice of another as to constitute the basis of an action, predicated on its wrongful or tortious nature. * * * * * The principle is everywhere well settled, that there can be no adverse possession, or claim of ownership, by a tenant for life which will operate to bar the estate in remainder, under the influence of the statute of limitations, which commences to run only from the death of the life tenant. (Citing authorities.) The reason is manifest. The possession of the life tenant must be taken to be conclusively friendly to the rights of the remainderman. The hostility of his *claim* cannot, in the absence of a hostile *possession*, be considered as an invasion of the rights of the remainderman, and, for this reason, it cannot be the ground or *gravamen* of a legal action. It is, therefore, commonly said that the possession of one is that of the other. The tenant for life is entitled to actual possession of the premises of which he is enfeoffed; the remainderman is *not* so entitled, as long as the life tenant is living. The actual possession of the former, therefore, is rightful, and not wrongful. It is not adverse to any right of the remainderman, but perfectly compatible with all his rights. The latter having no right of possession, either

actual or constructive, cannot be *disseised*, or *ousted*, in any proper acceptation of these words."

See also Pendley vs. Maddison, 83 Ala., 484, and other Alabama cases there cited.

Defendants' counsel undertake to show a material distinction between the case at bar and that of Pickett vs. Pope, *supra*. In that case the life tenant, supposing she owned the fee, executed a deed which purported to convey the full title; and possession was taken and held under it for more than twenty years before suit was brought. The doctrine of prescription was not applied to that case, and the plaintiff recovered in ejectment.

In the case at bar it is insisted by counsel for defendants that the presumption of a grant, or of a probate court sale, or a chancery court sale, or something else, ought to be indulged in order to quiet defendants' possession, for the reason that those under whom they claim *attempted* to buy the reversion from the proper source of title more than twenty years before suit was brought. To so hold would make the *attempt* to buy land just as effectual to pass the title as a deed properly executed by the owner.

This court, I apprehend, will not feel it a duty resting upon it to quiet the *wrongful* possession of defendants, before the time prescribed by statute for perfecting a bar to an ejectment suit, although the defendants may be in possession under color of, and a cloud upon, the title, and although they may have improved some *adjoining* land.

In the following cases those under whom the occupants held *attempted* to get the title from the proper source of title, and in some of them it was the life tenant who made the attempt, and possession continued in the occupants for more than twenty years. Notwithstanding, no presumption of a

grant was indulged to defeat the right of entry of the remainderman on the termination of the life estate.

Thompson vs. Simpson, 128 N. Y., 270.
Tilson vs. Thompson, 10 Pick., 362.
Jewett vs. Jewett, 10 Gray, 31.
Jackson vs. Johnson, 5 Cowan, 74.
Fleming vs. Burnham, 100 N. Y., 1.
Orthwein vs. Thomas, 11 Am. St. R., 159.
Mettler vs. Miller, 129 Ill., 630.

In Weatherhead vs. Barkersville, 11 Howard, 329, there was a partition of lands by the executor, to those entitled under the will, but no authority was given in the will to make the partition, and no order of court was shown authorizing it. The probate court records had been burned. The plaintiff (who was under disability) went into possession of the lands assigned him in the partition, and remained in possession about twenty years; then sold it and left the country. Other joint owners of the land went into possession of the lands assigned them in the partition and continued in the adverse possession thereof for forty years, when the plaintiff instituted suit to recover an undivided interest in the lands thus held for forty years adversely to him. The defendants in that case contended that, from lapse of forty years adverse possession, the jury were properly instructed that they might presume an order of court to partition or presume a grant. In discussing the doctrine of prescription under which presumptions sometimes arise from lapse of time, in that case, Mr. Justice Wayne said: "The point still to be noticed is so much of the instructions given to the jury, informing them that they might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters by order of a court, when the executor assigned them certain parts of

it. By the law of Tennessee, such a partition is a judicial act and becomes a record. It can only be proved as such records may be, and when it is alleged to have been lost or destroyed, its contents can only be reached by proofs of a certain fixed kind well known in the law. In the proper sense of the term 'presumed' the records of courts are never so. * * * The rule in respect to judicial records is, that before inferior evidence can be received of their contents their existence and loss must be accounted for. It must be shown that there was such record. * * * * The burning of an office and its records is no proof that a particular record ever existed." And in that case the defendants had equitable rights far superior to the rights of the defendants in the case on trial, and had been in adverse possession for forty years, yet the court declined to presume a partition or a grant.

No records of the probate court of Calhoun county, Ala., since it acquired jurisdiction of Hudson's estate were ever burned, lost, or destroyed.

The Principle Invariable.

Nor will it vary the principle of the cases *supra*, if the occupant, *having paid the purchase price, claims under invalid probate court proceedings.*

Jewett vs. Jewett, 10 Gray, 31.
Tilson vs. Thompson, 10 Pick., 362.
Stevens vs. Winship, 1 Pick., 317.
Fleming vs. Burnham, 100 N. Y., 1.

Nor if the *occupant* have had the *equitable* title for twenty years. So long as the *legal* title is not barred, the holder may maintain ejectment. Says Judge Somerville, in Woods vs. Montevallo Coal and Transportation Company, 84 Ala., pp.

567-8: "Nor does the evidence, in our opinion, raise any presumption, as matter of law, that the plaintiff ever executed a conveyance of the lands to the Alabama Coal Mining Company, whatever may be the presumption, from lapse of time, as to his father's having made such conveyance. *And it avails nothing in this action (ejectment) to infer a verbal authority on the part of the plaintiff, for his father, Thomas Woods, to make such conveyance, as this could give but an equitable interest in the land to the vendee, and such a title, apart from the operation of the* STATUTE OF LIMITATIONS, *would obtain no recognition in a court of law.*"

In the following cases the occupant had an equitable title, and in some of them had actual possession for over twenty years, but it was held that their equitable title and possession could not defeat the right of a remainderman to recover in ejectment:

Jackson vs. Johnson, 5 Cowan, 74.

Weatherhead vs. Barkersnille, 11 Howard, 329.*

Morris vs. McClary, 46 N. W. Rep., 238.

See also Allen vs. Kellman, 69 Ala., 303.

Nor will it vary the principle if *the plaintiff* have had the equitable title for twenty years, with the right to file a bill in equity and thereby secure the legal title and right of entry. If he afterwards perfect his equitable title by acquiring the fee, *then* his *right of entry* accrues, and from *then*, and not from any earlier period, the statute of limitations begins to run.

Redfield vs. Parks, 132 U. S., 239.

Laches will never defeat the *legal* title until it is barred by the statute of limitations.

Galway vs. M. E. R., 128 N. Y., 132.

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* The facts of this case, showing that the occupant held the equitable title, fully appear in Lawyers' Co-ops. Ed., Book 13, page 717.

It is only when *the right asserted* has existed for the prescribed period, and during the whole of which the *possession* of the occupant had been *adverse* or *hostile* to such right, that it is lost by prescription.

Redfield vs. Parks, *supra*.
Shorter vs. Smith, 56 Ala., 210.
Ross vs. Goodwin, 88 Ala., 390.
Note 14 Am. St. Rep., p. 634.

EQUITABLE TITLE.

"Courts of equity can no more disregard *statutory* and constitutional requirements and provisions than courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

Hedges vs. County of Dixon, U. S. supreme court, decided Nov. 8, 1893.
Cox vs. Holcomb, 87 Ala., 589.
Freeman on Void Judicial sales, § 55.
Bright vs. Boyd, 1 Story, 487.

Not only is a court of equity powerless to cure the defect in the probate court proceedings, but a subsequent statute attempting to accomplish such a result would be unconstitutional.

Robertson vs. Bradford, 70 Ala., 385, and cases cited.

"Estoppels are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all

cases should be limited to saving harmless, or making whole, the person in whose favor they arise, and they should not in any case be made the instruments of gain or profit."

Lindsay vs. Cooper, 94 Ala., 170.

Repayment of the money paid by Mrs. Hudson for the land which was applied to the discharge of incumbrances thereon, after deducting reasonable rents, is all the equity defendants are entitled to.

Davis vs. Gaines, 104 U. S., 386, and cases cited in the opinion.

This equitable right cannot be enforced in an ejectment suit.

DEFENDANT'S AUTHORITIES.

In McArthur vs. Carrie, 32 Ala., 75, a leading case upon the doctrine of presumption arising from possession for twenty years' lapse of time, Judge Stone (pages 94, 95) concludes his reasoning as follows: "We do not wish to be understood as saying that this presumption (to bar the right asserted) is always conclusive. In the first instance perhaps it never is so. In cases like the present, however, we hold that a *prima facie* presumption is raised, whenever there is proof of twenty years' uninterrupted adverse enjoyment and possession. * * * * This *prima facie* case may, of course, be overturned. It cannot be done by proving that the title was in its inception defective. Proof, to be effectual for this purpose, must be addressed to the *character* of the defendant's possession, either in its acquisition or use; must tend to show that such possession is not inconsistent with the plaintiff's rights; or some other excuse, independent of original defect of title, must be given for the seeming long acquiescence."

Following the principle of that case, Judge Somerville, in

Long vs. Palmer, 81 Ala., page 387, says: "And *the right of action itself existing*," the *disability* of the executor to sue did not suspend the running of the bar. The reason why a *disability* will not suspend the running of the bar beyond twenty years in Alabama is because the statute so provides.

See *ante* page 15, where the statute is set out.

In the case at bar we are not attempting to suspend the running of the bar beyond twenty, nor even ten years from the time plaintiffs' *cause of action accrued*. The *prima facie* presumption arising in this case from twenty years' possession was *overturned* in the exact mode pointed out by Judge Stone in McArthur vs. Carrie, *supra*—by addressing our proof to the *character* of defendants' possession, both in its *acquisition* and *use*. We have shown assigned dower, entitling the widow and her grantees to the possession until her death, which possession was not inconsistent with plaintiffs' rights.

The case of Matthews vs. McDade, 72 Ala., 377, is clearly distinguishable from the case at bar. In that case Alexander McDade was trustee, holding the *legal* title to the property for beneficiaries under a will or deed of trust, and among whom were the complainants, whose interest in the property was an *equitable* estate in remainder after the termination of a life estate. On pages 386-7 of the opinion it is said: "McDade, as trustee, had, conferred on him by the testator, the *power to sell* the land in controversy. * * * * He did make a sale and conveyance of it, to one William McDade, through privity with whom the appellant (defendant) claims title. We are to determine whether this sale and conveyance are referrable to the power, and were intended as an execution of it. If so, they operate *to cut off the remainder* created in the appellees." Proceeding, on page 387, it is further said: "It must be apparent that the transaction in question is not fairly or reasonably susceptible of any other interpretation than as indicating

an intention to execute the power; and *this intention* is to be collected from *all the circumstances.*" (Not from lapse of time merely.) On page 388 it is said: "We are authorized to conclude that the intention, *gathered from all the circumstances,* was to refer it (the execution of the deed) very clearly to the *valid powers* conferred by the will."

From the foregoing, all of which appears in the opinion before any mention is made of the rule of repose arising from lapse of time, it is clear that, regardless of such lapse of time, the court was of opinion that the deed was properly executed and passed the title.

The same is true of the case of Gosson vs. Ladd, 77 Ala., 223. In that case a *trustee* was clothed with the *legal title,* and the record showed that he had conveyed to defendants, and it was agreed (page 235) "that *the conveyance is sufficient in law to pass the estate and title of the grantors therein.*" The trustees and other grantors in the conveyance having the *legal title,* the above agreement as to *the effect* of the deed they had executed was conclusive against plaintiff's right to recover. It was not necessary to the conclusion reached in either case to discuss the presumptions arising from lapse of time.

There is another distinction between those cases and the case at bar. In each of those cases there was a *trustee* clothed with the *legal* title, having the *immediate right of possession,* upon which the plaintiff's equitable interest in remainder depended, and the rule in Alabama is, that, when *the holder of the legal title* to land is barred by the statute of limitations, all equitable interests dependent thereon, whether in possession or in remainder, are barred also.

Molton vs. Henderson, 62 Ala., 426.

Bryan vs. Weems, 29 Ala., 428.

Bennett vs. Garlock, 79 New York, 302.

Before proceeding to discuss the case of Woodstock Iron Company vs. Fullenwider, especial attention is called to the note at the end of the case as it appears reported in 12 Am. St. Rep., on page 78, which clearly shows that the decision of the case rests upon nothing but utter nonsense, without a shadow of law to support it. The note is as follows:

"The precise ground upon which the court proceeded in the principal case is not easy to comprehend. The action was ejectment. The plaintiffs were conceded to hold the title. The possession of the defendants and those under whom they claimed commenced when the plaintiffs were reversioners, not entitled to the possession; the plaintiffs could not have maintained any action to recover possession until the death of their mother, the tenant for life, terminated her estate, and for the first time vested them with the right of possession. They brought their action within the time allowed by law after their cause of action accrued, and yet were defeated by what appears to have been substantially the statute of limitations.

"The defendant held a cloud upon the plaintiffs' title, which might have been removed by a court of equity in an action on the suit-plaint of plaintiffs. A cloud upon the title is that which appears to be, but in law and in fact is not, title. The only harm which elsewhere results from such a cloud is, that the party whose title it clouds may find his title unmarketable, and at some distant time may have difficulty in producing the evidence requisite to rebut it, or show its true nature. But if he chooses to suffer these inconveniences, we never before heard that his real title became worthless, and his adversary's apparent title became real. Yet in Alabama, as appears from the principal case, the failure to remove a cloud upon a title may raise the presumption that it has ceased to be a cloud and has become fortified by the true title. The court did not, however, take the position that, in ordinary circumstances, the statute of limitations could run against a reversioner who brought his action to recover possession within the period appointed by statute after he became entitled to such possession. That position would have been unquestionably untenable. Orthwein vs. Thomas, 127 Ills., 554; 11 Am. St. Rep., 159; Lamar vs. Pearre, 33 Ga., 254."

"No presumption can justly be indulged from the failure to bring an action to remove a cloud upon a title, because, as a cloud is not a

title, it may continue to the end of the world without becoming anything substantial. It might as well be decided that one who, being libeled, fails to prosecute an action to vindicate his good character, thereby estops himself from ever after claiming to be an honest man, as that one who fails to remove a cloud upon his title creates a presumption that he has relinquished his true title to the holder of the cloud."

And we also call attention to the note to the case of Allen vs. DeGroot, 14 Am. St. Rep., beginning on page 634, where the doctrine of prescription as against a reversioner is fully discussed and the case of Woodstock Iron Company vs. Fullenwider is pronounced unsound. In connection with what is there said, we desire to add, that there is no law in Alabama requiring the heir to refund the purchase money before bringing ejectment to recover lands sold under a void probate court proceeding. "If," in such case, "there are equities resting in the purchaser which will render the recovery valueless to them (the heirs), they must be asserted in a court of equity—*of them a court of law cannot take cognizance.*"

Doe vs. Hardy, 52 Ala., 297-8.
Allen vs. Kellman, 69 Ala., 442.

In the case of Woodstock Iron Company vs. Fullenwider, *supra*, Judge Somerville says: "The plaintiff certainly had no right to sue in ejectment for these lands before the death of the widow, who was tenant for life, her possession, so far at least as concerns the legal title to the reversion, not being adverse or hostile to the heirs during the continuance of such particular estate."

The life tenant died June 26, 1879, less than ten years before the commencement of the suit. Hence, it is conceded that the plaintiffs are not barred by the statute of limitation of ten years.

In the opinion of the State court it is further said: "All

of our decisions, it is true, recognizing the doctrine of presumption by prescription based on the lapse of twenty years time are founded upon the principle of some laches on the part of some one, who, having the right and capacity to sue, either at law or in equity, neglects or omits to do so for such period of twenty years. * * * * * The plaintiffs in the present case, as reversioners, had no right, as we have said, to sue at law. But they had a right to go into a court of equity and remove the cloud from their title created by the probate court proceedings."

Could they have filed such a bill? If not, they were guilty of *no laches*. Conceding that a remainderman can file a bill to remove a cloud—which was otherwise held in Bone vs. Landsden, 85 Ala.—was there any cloud which a court of equity would remove? It has always been held by the courts of Alabama and the courts of the United States that a deed void on its face, or where the record of the judicial proceedings, upon which it depends for validity, shows that it is void, a court of equity will not entertain a bill to remove it as a cloud.

Posey vs. Conway, 10 Ala., 813
Florence vs. Pascal, 50 Ala., 28.
Rea vs. Longstreet, 54 Ala., 291.
Curry vs. Peebles, 83 Ala., 225.
Hannewinkle vs. Georgetown, 15 Wal., 547.
Tyson vs. Brown, 64 Ala., 244.
Morgan vs. Lehman, Durr & Co., 92 Ala., 440.

In Tyson vs. Brown, 64 Ala., 249, it is said that: The court will not "in any case interfere to avoid sales or to cancel conveyances which of themselves afford inherent, intrinsic evidence of their own illegality and invalidity. There is no reason for judicial interference; for such sale or conveyance bearing evidence of its invalidity, *cannot create a cloud* on the

title, * * * * *and lapse of time cannot endanger defenses against it*, if rights under it should be asserted. * * * * The sale and conveyance under the decree of the court of probate was void. The illegality vitiating them appeared *on the face of the record of the court of probate, which must have been produced as the very source and foundation of any right or title claimed under them; and its exhibition only was necessary to insure its condemnation. They create no cloud on the title of complainants, and embarrass no legal remedies to which they may resort for the recovery of possession and mesne profits.*"

A court of equity entertains jurisdiction to remove a cloud only in those cases where *extrinsic* evidence is necessary to show *the invalidity* of the deed or judicial proceedings on which it rests.

Morgan vs. Lehman, Durr & Co., 92 Ala., 440.

The only extrinsic fact relied on in the opinion of the supreme court of Alabama as showing a cloud is stated in the opinion as follows: "Extrinsic evidence would be necessary to show whether the holder of such particular estate was living or dead."

If the life tenant was dead, the bill could not be maintained, for on her death the remedy at law was complete. When she died complainant had the right to the possession and could maintain ejectment therefor, and hence could not file a bill to remove a cloud. But if the extrinsic evidence showed *she was living*, it is argued that the bill might be filed. Such extrinsic fact merely enabled complainants to maintain a bill to remove a cloud on their title *if, in fact, there was a cloud thereon.* The *invalidity of the administrator's deed*, which was the alleged cloud in this case, is not dependent on the life or death of the life tenant. Only such extrinsic facts as are required *to show the invalidity of a deed*, authorizes a

court of equity to entertain a bill to remove a cloud. That the life tenant *had not died* neither gave validity nor invalidity to the *administrator's deed.*

On page 426 of Pomeroy's Equity it is said: "While a court of equity will set aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, * * * * * still, if the defect appears upon its face and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it cannot be said that *any cloud whatever is cast upon the title.*"

In Posey vs. Conway, 10 Ala., 811, the court said that a void administrator's deed was *not a cloud* on the title of the heirs.

The invalidity of the administrator's deed in the case at bar could not have been shown by extrinsic proof *that the life tenant was living.* In all bills to remove a cloud certain proof is necessary. The complainants must show that they are in possession; or, not being in possession, have no right to sue for possession at law. In the case at bar it would have been necessary for the complainants to prove that the life tenant was not dead, simply to show that they had no right to sue at law. To maintain a bill to remove a cloud, the complainant would have been required not only to show the want of jurisdiction of a court of law, by reason of the fact that the life tenant was not dead, but they would have been required to show, further, *that the administrator's deed was a cloud on the title.* If the probate court proceedings showed the invalidity of the deed, it was *no cloud*, because it was void on its face, the probate court proceedings being a part of the deed and showing its invalidity.

See Posey vs. Conway, 10 Ala., 811.

Morgan vs. Lehman, Durr & Co., 93 Ala., 440.

3 Pomeroy's Equity, § 1399.

2 Story's Equity, § 700 a.
Tyson vs. Brown, 64 Ala., 244.
Rea vs. Longstreet, 54 Ala., 291.

The probate court proceedings were *not* extrinsic facts showing the invalidity of the deed. Such proceedings were part of the deed, and if they showed its invalidity, a court of equity was without jurisdiction to remove it as a cloud.

See authorities *supra.*

Judge Somerville says further: "Here then was a capacity to sue in a court of equity, so as to sweep away a cloud on the title of the plaintiffs, and, by an offer to do equity, to have the equitable title of the defendants, acquired at a void sale, divested out of them by a decree of a court of chancery. A failure to exercise *this power* for over twenty years was such laches as authorizes the inference that the right *to do so* is barred in any one of the modes in which *that result* may be effected."

While we cannot comprehend that the *same result* will be effected, in the case at bar, by permitting plaintiffs *to enter into possession of the land* that would be effected by *removing a cloud* from the title, the facts stated by Judge Somerville, and the law as declared by him, show that they had no right to file a bill for twenty years. In 1879 the life tenant died, and Judge Somerville shows that since her death such a bill could not have been filed. The plaintiffs, since her death, having had the right to sue at law for possession, which right excluded the jurisdiction of chancery to remove a cloud. There was then only thirteen years during which a bill *to remove a cloud* could have been maintained, and there has, consequently been *no* "failure to exercise *this power* (to remove a cloud) for over twenty years."

In several places in his opinion Judge Somerville, carelessly, says that the administrator's deed conferred the equitable

title on the life tenant. Of course she did not acquire the equitable title, for, if she did, a court of equity would not have "swept it away" as "a cloud on the plaintiffs' title." A cloud on the title is not "a good equitable title." The only right acquired by the purchaser at the void administrator's sale was, in the language of Judge Somerville, the right to "resort to a court of equity to compel the heir or devisee to elect a ratification or recission of the contract of purchase."

Freeman on Void Judicial Sales, §§ 53, 55, and authorities there cited.

Such a right is not an equitable title, but, if it were, "*such a title*, apart from the statute of limitations, would obtain *no recognition* in a court of law."

84 Ala., 567.

If, in fact, there was a cloud on plaintiffs' title which they could have removed, and it is to be *presumed* that they filed a bill for that purpose, it would be more reasonable to presume, also, that the prayer of their bill was granted, and the cloud actually removed, than to *presume* that they were compelled to convey their title to the holder of the cloud—a thing they were under no obligation to do.

Freeman on Void Judicial Sales, §§ 53, 55.

Suppose plaintiffs had filed a bill in chancery, and the *void* proceedings of the probate court had been declared *null*, and had been removed by decree of the court as a cloud on plaintiffs' title, this fact would not have given them a right to enter, or a right to bring ejectment, before the termination of the life estate.

The plaintiffs have not had the right to the possession—the right of entry upon the land—for ten years. On the death of the life tenant, the law conferred on them the right to enter. The right to enter cannot be lost by losing the right to remove a cloud. It is only when *the right asserted*

has existed for the requisite period, that it is lost by prescription.

Shorter vs. Smith. 56 Ala., 210.
Ross vs. Goodwin, 88 Ala., 399.
Tilson vs. Thompson, 10 Pick., 362.

It cannot be said that the case of Woodstock Iron Company vs. Fullenwider conclusively settles the law of this case. As this is the second ejectment suit, it is not *the same case* as Woodstock Iron Co. vs. Fullenwider. If it were, however, Code 1886, § 688a, provides that:

"The supreme court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at that time, is law, without regard to such former ruling of the law by it; but the right of third persons, acquired on the faith of the former ruling, shall not be defeated or interferred with by or on account of any subsequent ruling."

The supreme court, under this statute, reversed its former ruling in the *same case*, in Noble vs. Moses, 81 Ala., 548.

This court is not bound to follow the case of Woodstock Iron Company vs. Fullenwider, the rule of property in Alabama having been long settled, that twenty years' possession under claim of ownership does not affect the right of a remainderman to enter on the termination of the life estate.

Pickett vs. Pope, 74 Ala., 122.
Pendley vs. Maddison, 83 Ala., 484, and other Alabama cases there cited.
Burgess vs. Seligman, 107 U. S., 32.
Carroll vs. Smith, 111 U. S., 562.
Gibson vs. Lyon, 115 U. S., 439.

The last case cited was a second ejectment suit, the first suit having been decided by the State court.

The effect of any other rule would be to deprive unconsidered men of their property without due process of law.

Mettler vs. Miller, 129 Ill., 330.

Webster vs. Cooper, 14 Howard, 488.

Conclusion.

Before the action of the lower court, in charging the jury to return a verdict in favor of the defendants, can be sustained, *this court must presume:*

1st. That the *probate court ascertained* the jurisdictional fact that depositions were taken which furnished sufficient proof of the necessity of the sale of the lands to pay the debts of the estate, when the order of sale is *silent* as to any proof having been made *by depositions*, and, in fact, *recites* that *witnesses were introduced* to sustain the allegations of the petition.

Goodwin vs. Sims, 86 Ala., 102.

2d. That there *was an order* of the probate court authorizing the administrator to make the deed, when, if such an order had been made, it would necessarily have been "spread upon the minutes of the court;" (Hudson vs. Hudson, 20 Ala., 364; Dabney vs. Mitchell, 54 Ala., 196;) and when the probate court records are in evidence and *fail to show such an order.*

Doe vs. Hardy, 52 Ala., 297.

"In the proper sense of the word 'presumed,' the records of courts are never so."

Weatherhead vs. Barkersville, 11 Howard, 329.

Shaffer vs. Gates, 38 Am. Dec., 164.

Hathaway vs. Clark, 5 Pick., 490.

It would be strange doctrine to hold that lapse of time destroyed the verity of a record, or would authorize the court to presume the existence of a record, when the proof establishes ~~the fact~~ that no such record exists in fact.

Respectfully submitted,

J. A. W. SMITH,

Attorney for Plaintiffs in Error.

Case No. [illegible]

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. 329.

HARRIET A. BALKAM, ET AL.

v.

WOODSTOCK IRON COMPANY, ET AL.

CITY LAND COMPANY, ET AL.

BRIEF AND ARGUMENT OF S. L. FULLER, ESQ.,
SOLICITOR, ATTORNEY AND COUNSELOR FOR
LAND COMPANY, DEFENDANT IN ERROR.

CASE No. 14,379.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 329.

HARRIET A. BALKAM, ET AL.

v.

WOODSTOCK IRON COMPANY, THE ANNISTON CITY LAND COMPANY, ET AL.

BRIEF AND ARGUMENT OF J. J. WILLETT AND JNO. M. McKLEROY, ATTORNEYS FOR THE ANNISTON CITY LAND COMPANY, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiffs in error, who are citizens of the State of Texas, were also plaintiffs in the lower court, and are the heirs at law of Samuel P. Hudson, deceased, and commenced statutory proceedings in the nature of an ejectment suit for the recovery of the lands mentioned in the complaint. Two suits were

brought, but were consolidated before the trial. They sue the Woodstock Iron Company, the Anniston City Land Company, and other defendants, for the recovery of four hundred and forty acres of land in and near the corporate limits of the City of Anniston, stated in the agreed statement of facts to be worth two hundred and twenty-six thousand dollars ($226,000.00).

As a defense to the suit the defendants in error relied on the statute of limitations of ten years, also upon certain probate court proceedings, and also on the broad doctrine of twenty years prescription, which they claim has been thoroughly established by the decisions of the Supreme Court of Alabama.

This is the second action of ejectment brought by the same parties against the defendants to recover the same land, under the provisions of Section 2714 of the Code of Alabama of 1886, which provides that,

> "Two judgments in favor of the defendant in an action of ejectment, or in an action in the nature of an action of ejectment, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies, founded on the same title."

The first suit was commenced, tried and determined in the State court, upon the same facts which are now submitted to this Court, and was decided adversely in the Supreme Court of Alabama to the present plaintiffs in error. The decision of the Supreme Court of Alabama will be found reported, under the name of *Woodstock Iron Co. et al. vs. Fullenwider et al.*, 87 Alabama, p. 584. The present suit was brought in the Federal Court upon the same facts and between the same parties, and was again

decided adversely to the plaintiffs, by Bruce, District Judge. See *Bulbum et al. vs. Woodstock Iron Co. et al.*, 43 Federal Reporter, p. 645, from which decision of the United States Circuit Court the plaintiffs sued for and obtained a writ of error, and brought the case to this Court.

There is no dispute between the parties as to the facts of the case. The former action of ejectment, as well as the present one, was submitted upon an agreed statement of facts, and the sole question for decision is, whether certain proceedings in the Probate Court of Calhoun County, Alabama, for the sale of the lands in controversy, after the lapse of more than twenty years, accompanied by possession and claim of ownership by the purchaser and her subvendees, are sufficient to divest the title or defeat the suit of the plaintiffs, who are the heirs of Samuel P. Hudson, deceased. The defendants in error claim to have acquired the title of Samuel P. Hudson at a judicial sale under the proceedings of the Probate Court of Calhoun County, Alabama, where the land was sold to pay the debts of said Hudson's estate. The decision of the case involves the construction of certain statutes of Alabama for the sale of lands of decedents to pay debts and of the statute of limitations in that State in suits for the recovery of real property. At the request of the defendants in error, Bruce, the District Judge, who presided at the trial in the court below, gave to the jury an affirmative charge in favor of the defendants. This charge raises all the questions in the case.

The record shows that dower in these lands in

controversy was first assigned to Keziah A. Hudson, widow of Samuel P. Hudson, deceased, by the Probate Court of Calhoun County, Alabama, on February 9, 1866, and that afterwards, on the 20th day of March, 1866, James F. Grant. as Administrator of Samuel P. Hudson, under an order of the Probate Court of Calhoun County, Alabama, sold the reversion in said lands after the dower had been carved out, which reversion was also purchased by the widow, Keziah A. Hudson, for the sum of four hundred and fifty dollars; which amount she paid to the administrator in cash, and was used by him in paying the debts of decedent, and that said administrator, after making a report of said sale to the Probate Court which was confirmed, executed a deed of conveyance to her to the property on April 9, 1866; that she, Keziah A. Hudson, was in possession of said lands at the time of said administrator's sale, and after that continued to hold possession of the same in her own right until the Spring of 1869, when she sold the same to Sherman & Boynton and surrendered possession to them, and afterwards on the 28th of October, 1869, made a deed of conveyance to them in usual form; that Sherman & Boynton went into possession of the lands in controversy on the day of their purchase, holding and claiming the same as their own until they sold to H. L. Jeffers on December 10, 1872, who went into possession and held in a like manner until he sold and conveyed the same to the Woodstock Iron Company, one of the defendants, on June 24, 1874; that the Woodstock Iron Company went into possession on the day of purchase thereof as aforesaid, holding and claiming the same

in like manner until the present time, except as to the lands in the corporate limits of Anniston, which said lands were sold and conveyed by the Woodstock Iron Company to the Anniston Land & Improvement Company May 22, 1884, and by this Company sold and conveyed to the Anniston City Land Company on the 8th day of June, 1887; that the Anniston Land & Improvement Company went into possession of said lands under its purchase, claiming to own the same in like manner above stated and so the Anniston City Land Company after its purchase; that the several deeds above recited, from Mrs. Hudson to Sherman & Boynton, from Sherman & Boynton to Jeffers, from Jeffers to the Woodstock Iron Co., from the Woodstock Iron Co. to the Anniston Land & Improvement Co., and Anniston Land & Improvement Co. to the Anniston City Land Co., are in usual form of warranty deeds in fee simple, and were duly recorded; that Mrs. Hudson after her purchase of the reversion held and claimed the lands in her own right and title until she sold to said Sherman & Boynton; that the defendants and those under whom they claim have been in open and continuous possession of the lands, claiming the same as their own from the date of the purchase by Mrs. Hudson on the 20th day of March, 1866, to the bringing of this suit on the 8th day of June, 1889, or for more than twenty-three years. That the administrator of Hudson's estate died in 1878, and that the Probate Judge during the administration of said estate died in 1887.

The plaintiffs in this case were parties to the proceedings in the Probate Court for sale of said lands in controversy, and were duly represented by guard-

ian *ad litem*. No question was ever raised as to the sufficiency of the petition, or of the order of sale, or of the testimony supporting the order of sale. They now seek, by this collateral proceeding in ejectment, to have the sale declared void.

PROBATE COURT PROCEEDINGS.

Section 1737 of the Code of Alabama of 1852, which was in force at the time the lands in controversy were sold under the decree of the Probate Court of Calhoun County, Alabama, is as follows:

"The whole property of the decedent is charged with the payment of his debts, and the same must be sold for that purpose, if necessary, except in the cases provided for by the next section."

The next section refers to exempt property and is not material to the issues in this case. In order to invoke the jurisdiction of the Probate Court for the sale of the lands, there must be a petition filed by the administrator or executor of the estate, praying for the sale of lands to pay debts, and alleging one of the grounds prescribed in Sec. 1755 of the same Code, which is as follows:

"In cases of intestacy, lands may be sold by the administrator for the payment of debts:

1. When the personal property is insufficient therefor.
2. When it is more beneficial for the estate to sell lands than slaves."

THE PETITION.

It is practically admitted in the brief of the counsel for the plaintiffs in error that the petition was

sufficient in every respect, and hence we will not discuss this point, except to cite the Court's attention to the case of *Cotton vs. Holloway*, 12 Southern Reporter, p. 172, where the Supreme Court of Alabama expressly decides that a petition similar in every respect to the one in this case was sufficient to give the Probate Court jurisdiction.

THE ORDER OF SALE.

While plaintiffs' counsel in their brief admit the sufficiency of the petition for the sale of lands, they insist that the order of sale was void, because it did not show or recite that depositions were taken as in chancery proceedings, showing the necessity of such sale. In other words that the recital in the order of sale, that the administrator "introduced witnesses to sustain the petition" shows conclusively, they say, that depositions were not taken as in chancery cases; although the depositions of L. W. Cannon and G. B. Douthit were found in the Probate Court in the files of the case showing the necessity for such sale. A careful examination of the language used in the decree, in the light of the decisions of the Supreme Court of Alabama construing this statute, will remove this objection. The decree or order of sale uses this language: "And thereupon said administrator introduces witnesses to sustain the same (Petition), and, after hearing all the testimony in the case the Court is of the opinion that the allegations of said petition are fully sustained by the evidence in the case." It must be remembered that the depositions of L. W.

Cannon and G. B. Douthit, showing the necessity for this sale, were on file in the Probate Court and in this case. (See pages 26-7 of the Record). In construing the language of the Court used above, it must be held to mean that introducing witnesses to sustain the petition, the administrator offered legal and not illegal testimony. In other words, that the testimony of the witnesses was introduced by depositions as required by law, and not orally, as is argued by opposing counsel. There is nothing in the language used to suggest that the witnesses were examined orally, and every intendment will be against such presumption. The records of the Probate Court show that two witnesses were examined by depositions taken as in chancery cases to prove the necessity of the sale. The depositions of these witnesses were returned into the Court and filed, and spread upon the records of the Court as a part of the proceedings of said administration. These depositions were taken and returned into the Court prior to the making of said order of sale, and this, manifestly, was the evidence that was introduced in the Probate Court and referred to in the order of the Court. But independent of the fact that these depositions are on file in the Court, the language used by the Court is, under the decisions of the Supreme Court of Alabama, sufficient to sustain the jurisdiction of the Court upon a collateral attack. In *Goodwin vs. Sims*, 86 Ala., p. 107, the Supreme Court of Alabama, in construing this statute, says: "Under the statute it has been held, that the duty devolved on the Probate Court to determine whether the evidence has been so taken, and if the record discloses that the court adjudged that it was so taken,

the adjudication, however erroneously, is final and conclusive, and will support the decree of sale, except on error or appeal. *Bland vs. Bowie*, 55 Ala., 138. In *Massey vs. Smith*, 73 Ala., 174, it is said: "By the decree the Court of Probate ascertained and declared the depositions were taken as in chancery cases and that the facts were proved. The decree was final and conclusive upon those matters, when collaterally assailed, and could not be impeached by a reference to the depositions upon which the Court proceeded." In that case it seems that the Court adjudged that the depositions were taken as in chancery cases, and it was sought to impeach the finding by reference to the depositions of record in order to show that on account of errors and irregularities they were not so taken and did not prove the facts which authorized the Court to render a decree of sale. In *Bland vs. Bowie, supra*, the decree found that the depositions were taken in chancery cases, but was silent as to what was proved by them. The decree declared that they were filed of record in the proceedings. It was held that such reference to the depositions made them a part of the record; that the decree should be read as if they were incorporated in it by an express recital of their contents; and that the depositions must be looked to in determing whether the necessity of sale was proved. This was in support of the validity of the decree, as to a matter in respect to which it was silent. The rule deducible from these decisions, is that when the Court, by the recitals of the decree, ascertains the jurisdictional fact, such adjudication is final and conclusive, when the decree is collaterally assailed; and, *if the decree is silent, the jurisdiction-*

al fact may appear from other parts of the record." Proceeding further the Court, in the same case, *Goodwin v. Sims*, says: "As the entire record imports absolute verity, the recitals of the decree may be explained, limited or qualified, by other parts of the record. The entire record may be looked to, for the purpose of ascertaining the jurisdictional facts, when there is no finding by the court; for jurisdiction is acquired by the facts as they appear in the entire record; but, when the power to ascertain the jurisdictional fact is conferred on the court, and the court adjudges that it has jurisdiction, it is not overcome or destroyed, because other parts of the record may not be sufficient to uphold such finding.—*Bannon v. People*, 1 Bradwell, 496. *It must affirmatively appear that such finding can not be true.*"

Proceeding further the Court, in the same case (*Goodwin vs. Sims*, 86 Ala., 107), says: "It may be, that some of the cases referred to have carried to the utmost extent the interpretation and effect of jurisdictional recitals in the decrees of courts of statutory and limited jurisdiction; but such construction of the statute has been settled so long, and adhered to, with intervening re-enactments of the statute, that it should be regarded as having become a rule of property, and should not be disturbed. Extending to the recitals of the decree of sale the presumptions which these decisions extend to judicial proceedings when collaterally assailed, we are forced to hold that they satisfy the requirements of the statute, that the evidence must be taken by depositions as in chancery

proceedings, the entire record not appearing to ratify them."

To the same effect is *Pettus vs. McClanahan*, 38 Ala., 60, where the Court says: "When lands have descended to an infant or person of unsound mind, the statute of 1854 requires, if the Court of Probate orders such land to be sold on the application of the personal representative of the ancestor, that proof of the necessity of sale must be made by depositions taken as in chancery proceedings. On the Court is devolved the duty of determining whether the proof is thus made. The court alone examines the mode in which the proof is taken. Its determination of necessity is *res adjudicata*. If it errs in its judgment it is like any other error into which the court may fall the subject of revision and correction by an appellate tribunal. Until reversed the judgment is conclusive, the law attaches to it undisputed and undisputable faith and credit." See also,

Bland vs. Bowie, 53 Ala., 152.

Massey vs. Smith, 73 Ala., 178.

Carter vs. Waugh, 42 Ala., 452.

Kent vs. Mansel, 14 Southern Reporter No. 11.

The Supreme Court of Alabama, in the former decision of this case, in *Woodstock Iron Co. et al. vs. Fullenwider et al.*, 87 Ala., p. 194, did not hold, as assumed by opposing counsel, that the order of sale was void for want of jurisdiction. The Court in that case waived the decision of this question and held that even conceding the contention of plaintiffs on this point, they had lost their right to question the sufficiency of the order or any of the proceedings of

the Probate Court, by allowing twenty years to elapse before attacking it in any way.

ADVERSE POSSESSION AND STATUTE OF REPOSE.

Plaintiffs' whole case rests upon the theory that the possession of Mrs. Kezjah Hudson and the defendants who claim through her as purchasers at the Probate sale March 20, 1866, was friendly to plaintiffs until the death of Mrs. Hudson on June 26, 1879. Mrs. Hudson held a dower interest in all the lands belonging to the estate of her deceased husband, Samuel P. Hudson. At the time the petition for the sale of the lands to pay debts was filed, no dower had been assigned to her, and the object of the petition was to sell the lands to pay the debts, subject, however, to the widow's dower. In the meantime, however, and before the sale of these lands to pay debts, the dower was assigned, and at the sale of said lands the widow purchased the reversion in the same lands which had been assigned to her as dower, the lands being sold subject to her dower right by the terms of the order of sale. She paid $450.00 for the reversion in the lands, which was used by the administrator in paying the debts against the estate of Samuel P. Hudson. It cannot be pretended, and is not contended, that the fact of her being the widow and owner of the life estate in the lands, placed her upon unequal terms with other purchasers at the sale. So far as her rights are concerned, therefore, she occupies the same position as any other purchaser or

stranger would have no purchasing. The records of the Probate Court show that she paid the purchase money and the sale was reported to the Probate Court and confirmed. (See p. 38 of Record). And the administrator made a deed to her on April 3, 1866, for the land so purchased, which was duly and promptly recorded. She immediately entered into possession of the lands so purchased, and continued to hold them under claim of exclusive right and ownership until she sold and conveyed the same in 1889, and those claiming under her have continued to hold and claim in like manner down to the bringing of this suit, more than twenty-three years from the date of said sale to her.

There is no pretence that Mrs. Hudson or those claiming under her recognized the title of the reversioners. On the contrary, it clearly appears from the agreed statements of facts in the record, that her possession was not friendly but adverse to the reversioners and to all the world. The position upon which the plaintiffs seem to rely is that under the circumstances of this case it was impossible for the possession of the life tenant to be otherwise than friendly to the reversioners, and that the possession could not become adverse so far as the reversioners are concerned, until the termination of the life estate. It is certainly true that the possession of a mere life tenant is not adverse to a remainderman or reversioner during the continuance of the particular estate, and no conveyance which the life tenant can make will operate to cut off the remainderman or reversioner. But that is not this case. In the case at bar the sale was not made bythe life tenant, *but it*

was made by the Probate Court, which had authority to sell the interest of the reversioners, to pay the debts of the estate. It is not disputed that the Probate Court had power and jurisdiction to sell the reversionary interest after the termination of the life estate, for the purpose of paying debts. This is what the administrator, acting under the authority of the Probate Court, attempted to do and what he did do. In making this sale he was not acting for the life tenant; and the purchaser at such sale, so far as the reversionary interest is concerned, does not claim under or through the life tenant, but under the sale made by the Probate Court through the administrator, which was proceeding to do what it had power to do.

The following statutes appear in Chapter II, Code of Alabama, 1886:

"2612 (3223) (same as 2474, Code 1852). LIMITATIONS OF ACTIONS.—Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2614 (3225) same as section 2476, Code 1852). LIMITATION OF TEN YEARS.—Within ten years.— * * * * * *

"2. Actions for the recovery of lands, tenements, hereditaments, or the possession thereof, except as herein otherwise provided."

"2624 (3236) (same as section 2476, Code 1852). ADDITIONAL TIME ALLOWED INFANTS, ETC.—If any one entitled to bring the actions enumerated in this chapter, or make an entry on land, or defense founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, or a married woman, or insane, or imprisoned on a criminal charge for any term less than for life, he or she shall have three years after the termination of such disability to bring suit, or make entry or defense; but no disability shall extend the period of limitation so as to allow such

action to be commenced, or entry or distress made, after the expiration of twenty years from the time the cause of action accrued, nor shall this exception extend to a married woman, in respect to her separate estate."

We do not contend against the principles announced in *Pickett vs. Pope*, 74 Ala., 193; *Mobley vs. King*, 39 Am. Dec., 173; *Hart vs. Kimbell*, 33 Ala., 144, and other cases relied upon by opposing counsel. Of course a mere life tenant, having no power to sell the fee can not hold adversely to remainderman or reversioners, or do anything to injuriously affect their title during the continuance of the particular estate. In the cases relied upon by plaintiffs' counsel there was no power in the life tenant to sell the fee. The proposition which we assert is, that whenever there is an estate for life in one person and an estate in remainder or reversion in another, whether such estate be created by deed or will, or by the law, and *there is a power to sell the fee* and such sale is made, though defectively, during the life estate, and the purchaser holds open, notorious and uninterrupted possession for more than twenty years claiming the fee, the remainderman or reversioner is barred, though he sue the day after the life tenant dies. This is no new doctrine. We are not asserting that mere lapse of time pending the life estate will bar a remainderman, nor that the deed of the life tenant purporting to convey the fee, coupled with twenty years possession under that deed during the life estate would bar the remainderman. One thing is essential—*the power to sell the fee*. If the power to sell the fee be vested in the life tenant, and the life tenant does sell the fee, though the deed granting

it be apparently defective, still if the purchaser holds open, notorious and continuous possession of the land for twenty years as his own, then his possession is adverse to the life tenant and adverse to the remaindermen and his title is perfected by prescription. It often occurs in Alabama that the fee simple estate is divided by the Courts, as where the owner of the fee dies, as in the case at bar, and dower is assigned to the widow. This creates a life estate in the widow and a reversion in the heirs at law, and in such cases it very often happens that the court orders the administrator to sell the reversion in the dower lands. The administrator has no estate in the reversion, but he has under the court's order power to sell the reversion—the title of the heirs. Now when such sale is made and the sale confirmed and the money paid and used by the administrator in paying the debts against the estate, and the deed made to the purchaser, should it be said that the possession of such purchaser is friendly to the title of the heirs? Then suppose that the purchaser buy the dower estate and take and hold the land as his own for more than twenty years. Would the courts of Alabama, whether State or Federal, permit the heirs to show some defect in the decree of the court ordering the sale or some irregularity in the sale itself to defeat the title of such purchaser? Surely not. For in all such cases the courts will presume anything possible to perfect the title of the purchaser, and such title, though defective at its inception, would become perfect by prescription, or by what is known as the statute of repose.

It is contended by the plaintiffs that [illegible] bar that they had no right to [illegible] ing the life of the life tenant. [illegible] Westfield Ins. Co. vs. Fillmore, [illegible] is the same case as this (this being the second action of ejectment allowed by the statute of [illegible]) the court says: "The plaintiffs in the present case as reversioners had no right as we have said to sue at law, but they had a right to go into a court of equity to remove the cloud from their title created by the Probate Court proceedings. This cloud consisted of the administrator's deed and other record evidence of a sale, under the operation of which the purchaser had acquired an equitable title. Under an adverse possession such a title would become perfect in ten years after the death of the life tenant, and extrinsic evidence would be necessary to show whether the holder of such particular estate was living or dead. The deed and other proceedings, therefore, were of a character to be used to injuriously affect the complainant's title, and operated moreover to impair the market value of the reversion and to prevent its sale by the owners in the event they desired to dispose of it. And while one having the legal title to land with the right of possession would be compelled first to recover possession by ejectment before invoking the jurisdiction of equity to quiet it, yet the rule is different where the complainant's title is equitable, or where like a reversioner or remainderman he is not entitled to possession by reason of the existence of a life or particular estate. In the latter class of cases the complainant may at once resort to equity to have the objectionable proceedings vacated as a

cloud on his title, especially when it is necessary to do some act of equity as a condition precedent to its exercise. That act in this case would be to tender to the purchaser the amount bid at the sale, whether with or without interest we need not decide. That a reversioner or remainderman may file such a bill on the same principle upon which he is permitted to redeem from a mortgage sale we consider to be clear, both on principle and authority, his remedy at law being entirely inadequate. As observed in a recent case holding this view 'a remainder (or reversion) is a present right though the enjoyment is future, and the owner may desire to dispose of it or in some way to make it available to his needs; and he is entitled to have it relieved from a cloud impairing its value, and perhaps rendering it wholly unavailable,' " citing *Aiken vs. Suttle*, 4 Lea (Tenn), 105; and cases cited on p. 110; 3 Pom. Eq. Jur., Sec. 1220, 1398-1399, note 4; 1 High on Injunc. (2d Ed.), Sec. 330; 3 Wait's Act. and Def. 190-191. Continuing, the court says in this same case of *Fullenwider vs. Woodstock*, *supra*: "Here, then, was the capacity to sue in a court of equity, so as to sweep away a cloud on the title of the plaintiffs, and, by an offer to do equity, to have the equitable title of the defendants, acquired at the void sale, divested out of them by a decree of a court of chancery. A failure to exercise this right for over twenty years is such *laches* as authorizes the inference that the right to do so is barred in any one of the modes in which that result may be effected. If the only existing right of action on the plaintiff's part were at law—if his only *laches*, or slumbering on his rights, consisted in his failure to sue at law—

[illegible] ...ney, can you have relief in equity? ... inquiry, the only answer ... defendant's possession ... tion, or in the ... hands; pursuant to ... other; hostile and ... pated to the ... the Probate Court ... for even twenty ... though void at law, ... reversion had been acquired, ... session and claim of ownership, ... purchaser and her sub-vendees, ... this long period. The fair legal ... from this state of facts, ... purchaser, or those claiming title under her, ... filed a bill in equity compelling the heirs ... to convey to them the legal title, ... untary conveyance of such title ... such heirs, thereby converting their equitable into a legal title."

In *Lowery* vs. *Davis*, 8 So. Rep., 73, ... a decision from the Supreme Court of ... McClellan, J., says: "A careful ... case fails to disclose any ... it and the ... 514. ... exhaustive ... cases follow ... as the settled ... the logic of ... session under ... the title of a ...

standing the disability of the owner of the reversion or remainder to sue at law for recovery of possession within that time. See *Landsen vs. Bone*, ante, 85. That doctrine, operating to perfect the title of the party in possession for the period of prescription, applies fully to the present case, and the judgment below is affirmed on the authority of the cases cited."

The counsel for plaintiffs in error, in their brief, assert they could not have filed such a bill to remove the cloud upon that title, and cite the case of *Bone vs. Lansden*, 85 Ala., 562. This case (*Bone vs. Lansden*) does not assert the doctrine contended for. In that case the husband and wife executed a warranty deed to the wife's separate estate as security for the husband's debt. The wife died, and by virtue of the laws of Alabama the husband became entitled to a life estate in her lands, which life estate passed immediately to the grantee in the deed under the covenants of warranty contained therein. The heirs of the wife then filed a bill to cancel the deed as a whole, as a cloud on their title. This was refused by the court, because the deed was not wholly void, for it had passed the after acquired life estate of the husband, and was valid as to that. When this case came before the Supreme Court a second time (see *Lansden vs. Bone*, 90 Ala., 446), the heirs recognized the validity of this mortgage as to the life estate of the husband, and modified their bill so as to pray that the mortgage be cancelled as a cloud on their title in remainder, which prayer was granted by the court, the court holding that "a mortgage of lands belonging to the wife's statutory estate executed by her and her husband jointly, as security for his debt,

to sell and convey to the vendee, and [illegible]
a bill to compel the [illegible]
whether also in its course of [illegible]
is a valid conveyance of the [illegible]
after her death her heirs may [illegible]
cel it as a cloud on their title to [illegible]
offering to redeem or to pay the [illegible]
In this same case the Court [illegible]
Woodstock Iron Co. vs. Fullerton, 97 Ala., [illegible]
so it does in *Slade vs. Burden*, 99 Ala., p. [illegible]

The essential foundation of prescription is the presumption of a grant. If, therefore, it appears that there never could have been a grant, there [illegible] is no room for presumption, and consequently no prescription. *But if it appears that there was originally power to make the grant*, then there is a foundation for the presumption.

In all the authorities we have seen in cases of this kind which deny the presumption of a grant, or prescription, there was no power in the life tenant, or trustee, *to sell the entire fee*,—the entire absence of power to sell anything more than his own interest. Under such circumstances no presumption of a valid grant could arise from any lapse of time, however long continued, simply because none could have been made originally.

But in this case the Probate Court, through the administrator of the estate, had full and complete power to sell the fee for the payment of debts, and that power distinguishes this case from the cases relied upon by opposing counsel.

In *Williams vs. Dobbs*, 2 Head's Reports (Tenn.),

p. 675-7, it is said: "It is not indispensable in order to lay a proper foundation for the legal presumption of a grant, to establish a probability of fact that in reality a grant ever issued. It will afford a sufficient ground for the presumption to show that by legal possibility a grant might have issued. And this appearing, it may be assumed, in the absence of circumstances repelling such conclusion, *that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.* * * * * *To destroy the foundation of the presumption it should appear that the issuance of a grant was a legal impossibility.*"

So also, it has often been declared, "An Act of Parliament, a grant from the Crown, a deed, in fact anything which will quiet a possession, may be presumed from length of time, where such Act, grant or deed could have been lawfully passed." And in *Willson vs. Holt*, 83 Ala., 529, where a decree in chancery granting a divorce to the husband rendered in February 1861, being collaterally assailed in a suit begun in 1883 because the divorce was not shown to have been ratified and confirmed by legislative act, as then required by constitutional provisions, it was held that legislative ratification would be presumed after such a lapse of time in connection with proof that the husband had married again and lived with his second wife until his death.

Matthews vs. McDade, 72 Ala., 377, is also a case in point to support the proposition for which we are contending. In that case James McDade executed a deed of trust conveying the tract of land, about four

hundred deeds, to Alex W. [illegible] use of the grantor [illegible] for life, with remainder to [illegible] James McDade on the day the [illegible] made his will, and therein referred to said deed of trust. The will and deed were both admitted to probate together as a will. In this deed there was a *power to sell the fee* given to Alex W. McDade, as Trustee, and Alex McDade was named as one of the executors in the will, and he only, acted as such. The widow dissented from the will and claimed her dower as secured by statute. The will and trust deed were executed by the testator May 25, 1850, and on the 23rd of September, 1850, after his death, the executor filed a petition in the Probate Court to sell the land for distribution, and the order of sale was granted. (At this point either the court or the reporter made a singular mistake of fact. The court says, in substance, that no report of such sale was made to the Probate Court and no authority to convey was obtained. The reporter in the statement of facts says, on the 6th of January, 1851, a report of the sale was made by the executor, and that the court confirmed the sale and ordered A. W. McDade, executor as aforesaid, to convey, copying the order, pp. 382-3). In June 1853 the executor made a final settlement of the estate. On the 27th of December, 1855, the executor made a deed to William [illegible], the purchaser. Nancy E. McDade the only [illegible] died in 1864, and her children, the [illegible], were all infants, and the oldest became of age in 1875, and the bill was filed August 25, 1875. The Chancery Court granted relief, but the Supreme

Court of Alabama reversed the decree and dismissed the bill. And this ruling of the Supreme Court, though treating the deed of the executor as an execution of the power, does so expressly because of so great a lapse of time. The court, after discussing the power and order of sale, says: "And while the statute of limitations can not be invoked to bar the claim of the remaindermen, if the power in question has never been so executed as to legally divest their title, yet a presumption is raised by this lapse of time, upon another principle, favorable to the repose of the appellant's title. Twenty years is a period of time beyond which the courts are indisposed to permit past human transactions to be disturbed by judicial investigation."

In *Kelly vs. Hancock*, 75 Ala., 229, the reversionary interest in certain lands, subject to the widow's dower, had been sold by proceedings in the Probate Court. The purchaser of the reversionary interest also purchased the life estate of the widow, thus uniting in himself the life interest and the reversionary interest. He received, however, no deed to the reversionary interest or the life estate. It was held that after twenty years of uninterrupted possession the court would conclusively presume payment of the purchase money and that the conveyance had been made, and this notwithstanding the fact that it plainly appeared no conveyance had been made.

Gosson vs. Ladd, 77 Ala., 223, is also a case where the remainder was barred by the presumption arising from adverse possession for more than twenty years, in a case where there was *power to sell the*

Gee. Mr. Justice Chapman, who delivered the opinion in that case, says: "More than thirty years after the making of the conveyance, and before the commencement of this suit, during all which time the defendants and those under whom they claimed have been in open, notorious, and adverse possession, claiming title. The period of time has expired, after which it is the policy of the law to quiet past transactions, and when the courts will indulge for this purpose all reasonable presumptions. After such a lapse of time, and such uninterrupted possession, it is permissible to invoke the rule of presumption in favor of a due execution of the power of sale, and of the regularity and validity of a conveyance, sufficient in law to pass the estate and title of the grantor—Matthews vs. McDade, 72 Ala., 377."

Melvin vs. The Proprietors of Locks and Canals, 17 Pick. (Mass.) 255, is also to the point. There a married woman owning land signed and acknowledged with her husband a deed purporting to convey her land, in 1782, but the wife's name did not appear in the body of the deed and in the body of the deed it purported to be the deed of the husband only. The purchaser and those claiming under him held open, notorious and continuous possession from 1782 till 1832. The wife died soon after the deed was made and left children. So her husband was tenant for life by the courtesy, and all his life estate passed by his warranty in said deed. The husband died in 1830, and in 1832 the son of the wife, as reversioner and her heir, brought suit for the land. In the trial court the Judge declared the deed was void as to the wife, because her name did not appear in it, but he

left it to the jury to say whether after so great a time they would not find that another deed was made, and the jury so found. In the Supreme Court of Massachusetts, on motion for a new trial, it was held that the lower court was correct, and that the finding of the jury ought not to be disturbed.

In *Bozeman vs. Bozeman*, 82 Ala., 389, the court in speaking of the doctrine of prescription, or what is known as the statute of repose, says: "We have, in this State, by a long series of decisions, established the rule, that the lapse of twenty years will operate as a positive bar to the enforcement of every character of legal right in the courts of this State, unless there has been, within that period of time, a recognition or admission of some material fact on which the right in question may be adjudged to rest, and which, therefore, keeps it alive and in force. The rule is one of presumption, based on the broad doctrine of prescription, and is not to be rebutted. It has in view the peace and security of society, and is applicable, as often held, to all human transactions which are open to judicial investigation. *The doctrine is broader and more comprehensive than a mere statute of limitations, although based on analagous principles.*"

In *Molton vs. Henderson*, 62 Ala., 426, it was held, that, where the legal title to lands resided in trustees, or a survivor of them, and such lands were sold by guardian of the *cestui que trust* under void proceedings, and the purchaser went into possession, the statute of limitations began to run from such sale and possession under it, and is not suspended by the death of the trustees after such possession ac-

cused, although the cestui que trust, during all of the time was a lunatic.

In *Herrington vs. Heflin*, 54 Ala., at pp. 563, 564, the Court speaking through Chief Justice Brickell expressly reaffirms *McArthur vs. Carrie*, 32 Ala., 88, a leading case in our favor, and quotes approvingly that portion of the opinion on which we rely; and after holding that the period of the war, during which the statutes of limitations were suspended, could not be excluded from the twenty years, from the lapse of which prescription arose, uses the following language: "The suspension of the statute is by force of Ordinance No. 4, of the Convention of 1865," (which deducts the time elapsing between the 11th day of January, 1861, and the 21st of September, 1865, from the statute of limitations), "and rests on the difficulty or impossibility of suit while the community were harrassed and perplexed by war, and the courts were either closed or embarrassed in the exercise of authority. This may acquit suitors from the imputation of *laches*, but the presumption rests not only on the want of diligence in asserting rights, but on the higher ground that it is necessary to suppress frauds, to avoid long dormant claims, which, it has been said, have often more of cruelty than of justice in them—that it conduces to the peace of society and the happiness of families; 'and relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life, that the attainment of truth and justice is next to impossible.' * * * The presumption has not been countervailed by evidence of disability of suit all the war can be said to have

created, and its value would be lessened if the exception were now allowed. It is perhaps true, greater force and a larger operation has been given the presumption by this court, than the current of authorities sanctions. *It has been in obedience to a well defined public policy, which requires a fixed period of time that shall silence judicial controversies.*"

In this same case, (*Heflin vs. Harrison*) at p. 563, it is said of *McArthur vs. Carrie*, 32 Ala., 88: "The suit was by an administrator *de bonis non*, commenced immediately on his appointment. Until his appointment there was no party capable of suing, and the possession of the defendant was not protected by the statutes of limitations. It was therefore insisted the presumption could not be drawn. *The Court, regarding the presumption as more general in its operation than the statute of limitations, held the want of a proper party to sue would not overturn it.*"

In *McCartney vs. Bone*, 40 Ala., 536, it was held that infancy and coverture would not avail to rebut the presumption.

This rule of repose, however much its policy may be questioned and disregarded elsewhere, has had no variableness or shadow of turning in the courts of Alabama. It is, in that State, the one grand *judicial statute*, which of itself proves the wisdom of the common law. The following unbroken line of authorities by the Supreme Court of that State will show how firmly imbedded is this doctrine of repose in the Judicatory of that State:

McArthur vs. Carrie, 32 Ala., 75.

Rhodes vs. Turner, 21 Ala., 210.

Gantt vs. Phillips, 28 Ala., 775.
Lay vs. Lawson, 28 Ala., 777.
Barnett vs. Torrence, 28 Ala., 403.
Harvey vs. Thorpe, 28 Ala., 250.
Milton vs. Haden, 32 Ala., 30.
Blackwell vs. Blackwell, 32 Ala., 57.
Wyatt vs. Scott, 33 Ala., 313.
Roundtree vs. Brantley, 34 Ala., 551.
Nelson vs. Gores, 34 Ala., 580.
Flemming vs. Gilmer, 35 Ala., 62.
Austin vs. Jordan, 35 Ala., 642.
Harrison vs. Harrison, 39 Ala., 489.
Marston vs. Rowe, 39 Ala., 722.
Worley vs. High, 40 Ala., 171.
White vs. Hutchings, 40 Ala., 253.
Kirby vs. Kirby, 40 Ala., 492.
McCartney vs. Bone, 40 Ala., 533.
Foster vs. Chamberlain, 41 Ala., 158.
Harrison vs. Heflin, 54 Ala., 562.
Goodwin vs. Baldwin, 59 Ala., 127.
Ware vs. Curry, 62 Ala., 274.
Garrett vs. Garrett, 69 Ala., 429.
Matthews vs. McDade, 78 Ala., 377.
Holt vs. Wilson, 75 Ala., 58.
Kelly vs. Hancock, 75 Ala., 329.
Long vs. Parmer, 81 Ala., 294.
Bozeman vs. Bozeman, 82 Ala., 389.
Werborn vs. Austin, 82 Ala., 496.
Davis vs. Memphis & Charleston Railroad Company, 87 Ala. 634.
Knabe vs. Burton, 88 Ala., 436.
Ross vs. Goodwin, 88 Ala., 390.
Duncan vs. Williams, 89 Ala., 341.

Semple vs. Glenn, 91 Ala., 245.

In *Phillippi vs. Phillippe*, 115 U. S., pp. 151, 157, which was an appeal from Alabama, the Supreme Court of the United States, through Mr. Justice Woods, recognize and adopt the statute of repose in Alabama, and cite approvingly *Harrison vs. Heflin*, 54 Ala., and other cases sustaining the same doctrine. And in *Balkam et. la. vs. Woodstock Iron Co. et. al.*, 43 Fed. Rep., p. 648, Bruce, J., also recognizes and adopts this doctrine of prescription, or, as it is sometimes called, the statute of repose, which is so firmly imbedded in the laws of Alabama, and states that it has become a rule of property in that State.

This doctrine established in Alabama finds strong support in the following language used by the Supreme Court of the United States, in the case of *Grignon's Lessee vs. Astor*, 2 How. (U. S.), 343: "We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceeded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents, by order of those courts to whom the laws of the States confide full jurisdiction over the subjects."

And to the same effect is *Hepburn vs. Auld*, 5 Cranch, 276; also,

Florentine vs. Barton, 2 Wall., 210.

Kellar's Lessee vs. Eckert, 4 How., 297.

Ewing vs. Burnett, 11 Peters, 53.

In this latter case (*Ewing vs. Burnett*), the court says: "On the evidence in the cause the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams, under a deed in virtue of which he had made no assertion of right from 1798, in favor of a possession, such as the defendant held from 1804; though it may not have been strictly such an adverse possession as would have been a legal bar under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years; and we think that the evidence in this case was in law sufficient to authorize the jury to have made the presumption to protect a possession of the nature testified for thirty years; and if the jury could so presume, there is no error in over-ruling the first motion of the plaintiff." To the same effect are,

Hughes vs. Edwards, 9 Wheat., 489.

Robinson vs. Minor, 10 How., 627.

Davis vs. Gaines, 104 U. S., 386.

Clement vs. Packer, 125 U. S., 309.

THE FEDERAL COURTS WILL FOLLOW THE DECISIONS OF A STATE COURT IN CONSTRUING A STATUTE OF LIMITATIONS.

In *Burgess vs. Seligman*, 107 U. S., p. 20, it was held that where, by the course of the decisions of the State courts certain rules were established which become rules of property and action in the State, they have all the effect of law, especially with regard to the law of real estate, and the construction of State constitutions and statutes, and the courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence.

In *Leffingwell vs. Warren*, 2 Black (U. S.,) p. 603, the court says: "The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to the statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text." (Citing many authorities from the Supreme Court of the United States.) "If the

highest judicial tribunal of a State [illegible] as to the proper construction [illegible] reverse its former decisions, when [illegible] the latest settled adjudications. [illegible] *Morrison*, 4 Peters; and *Green vs. Neal's Lessee*, 6 Peters, 291."

Continuing the court says in this same case, (*Leffingwell vs. Warren*): "The equities in behalf of the plaintiff below, are strong. We have all felt their force. Without any fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court."

In *Bucher vs. Cheshire Railroad Co.*, 125 U. S., p. 583, the Court, through Mr. Justice Miller, says: "The Congress of the United States, in the act by which the Federal Courts were organized, enacted that 'the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Rev. Stat. 721; Judiciary Act, 24 Sept., 1789, c. 20, 34, 1 Stat. 92. This statute has been often the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded 'as rules of decision in trials at common law' is a subject which has not been ascertained and defined with that uniformity and precision desirable in a

matter of such great importance. The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty; nor is it applicable to criminal offenses against the United States, or where the Constitution, treaties or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the *laws* of the several States shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law. It has been held by this court that the decisions of the highest court of a State in regard to the validity or meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In *Leffingwell vs. Warren*, 2 Black, 599, this court said, in regard to the statutes of limitations of a State: 'The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.' * * * It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal Courts. The principle also applies to the rules of evidence.

In *Ex parte Fisk*, 113 U. S., 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts.' There are undoubtedly exceptions to the principle that the decisions of the State courts, as to what are the laws of that State, are in all cases binding upon the Federal Courts. The case of *Swift vs. Tyson* 16 Pet. 1, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the State court, it was not bound to follow the latter. There is, therefore, a large field of jurisprudence left in which the question of how far the decisions of State courts constitute the law of those States is an embarrassing one. There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs and common law. When, therefore, in an ordinary trial in an action at law we speak of the common law we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the State courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people,

that the trouble arises. * * * * We are of opinion that the adjudications of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath day, contrary to the statute of the State, being thus in the act of violating a criminal law of the State, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that State, declaring as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts, on that subject."

In *Bauserman vs. Blunt*, 147 U. S., 647, it was held that the construction given by the Supreme Court of the State of Kansas to a statute of limitations of that State will be followed in the United States Supreme Court, even in a case decided the other way in the United States Circuit Court before the decision of the State Court. Mr. Justice Gray, speaking for the court, on p. 652 *et seq.*, says: "Both questions depend upon the local law of Kansas. By a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that 'the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or

provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Act of Sept. 29, 1789. Rev. Stat. 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court. (Citing a great number of authorities.) In *Patton vs. Easton*, 1 Wheat. 476, 482, and again in *Powell vs. Harman*, 2 Pet. 241, this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the Supreme Court of the State, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in *Green vs. Neal*, 6 Pet. 291, a judgment of the Circuit Court of the United States, which had held itself bound by those cases in this court, was reversed, because of more recent decisions of the State court, establishing the opposite construction. * * * In *Leffingwell vs. Warren*, 2 Black, 599, 603, Mr. Justice Swayne, speaking for the court, laid down, and supported by reference to former decisions, the following propositions: 'The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to the statute of a State by the highest judicial

tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' * * * * In *Tioga Railroad vs. Blossburg & Corning Railroad*, 20 Wall., 137, 143, this court, following the decisions of the Court of Appeals of New York, held that a foreign corporation could not avail itself of the statue of limitations of that State; and Mr. Justice Bradley, in delivering judgment, said: 'These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles.' In *Amy vs. Dubuque*, 98 U. S., 470, Mr. Justice Harlan, summing up the result of the previous decisions in the very words of some of them, said that, 'it is not to be questioned that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important of sovereign rights;' and that it is as little to be questioned that 'the courts of the Uuited States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals.' Upon the question how far a saving clause as to married women in a statute of limitations is affected by a subsequent statute of the State enlarging the rights of married women, this court, in two comparatively recent cases, has come to differing conclusions by

following in each case a single decision made by the highest court of the State since the case was brought to this court from the Circuit Court of the United States. *Kibbe vs. Ditto*, 93 U. S., 674; *Mowrey vs. National Bank*, 104 U. S., 625."

It manifestly follows from the foregoing authorities that this court will adopt the construction of the statute of limitations of Alabama as defined and applied by the Supreme Court of Alabama, and so construed and applied, the decisions of that State cited above, are conclusive against the right of plaintiffs to recover the lands sued for.

Respectfully Submitted,

J. J. WILLETT,

JNO. M. McKLEROY,

Attorneys for Anniston City Land, Co., Defendant in Error.

Case No. 14,078.

HARRIET A. BALKAM, ET. AL.

vs.

WOODSTOCK IRON COMPANY ET. AL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Term No. 578.

Brief and Argument of Jno. H. Kyper, Counsel for Defendants in Error.

G. L. Stevens, Printer, Anniston, Ala.

Case No, 14379.

HARRIET A. BALKAM ET. AL.

vs.

WOODSTOCK IRON COMPANY ET. AL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1893.

Term No. 329.

BRIEF AND ARGUMENT OF JOHN B. KNOX,
COUNSEL FOR APPELLEES.

Statement of the Case.

The plaintiffs in this case, who are the heirs at law of Samuel P. Hudson, deceased, have brought two actions of ejectment against defendants to recover possession of certain lands lying within and contiguous to the corporate limits of the city of Anniston. The actions are the same, between the same parties, and involving the same lands, and for convenience were consolidated in the court below.

The actions as consolidated are what is termed a second action of ejectment brought by the same parties against the defendants, to recover the same land, under the provisions of Section No. 2714 of the Code of Alabama of 1886, which provides that "Two judgments in favor of the defendant in an action of ejectment between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the land or any part thereof, between the same parties, or their privies, founded on the same title."

The first suit was commenced, tried, and determined, in the State Court upon the same facts which are now submitted to this Court, and decided adversely to the present plaintiffs in the Supreme Court of Alabama. The decision of the court will be found reported under the name of the Woodstock Iron Company et. al. vs. Fullenwider et. al. 6 Sou. Reporter, 198. The present suits are brought in the Federal Court, and this Court is asked to overrule and repudiate the decision of the State Court, upon the same facts and between the same parties.

There is no dispute between the parties as to the facts of the case. The former action of ejectment, as well as the present one, was submitted practically upon an agreed state of facts, and the sole question submitted for decision is whether certain proceedings in the Probate Court of Calhoun County, Alabama, for the sale of the lands in controversy, after the lapse of more than twenty years, accompanied by possession and claim of ownership by the purchaser, are sufficient to divest the

title, or defeat the suit of the plaintiffs, who are the heirs at law of Samuel P. Hudson, deceased.

The defendants claim to have acquired the title of Samuel P. Hudson at a judicial sale under the proceedings of the Probate Court of Calhoun County, Alabama, where the land was sold to pay the debts of said Hudson's estate. The decision of the case involves the construction of certain statutes of Alabama for the sale of lands of decedents to pay debts, and of the statute of limitations in this State, in suits for the recovery of real property.

Probate Court Proceedings.

Section 1737 of the Code of 1852, which was in force at the time the lands in controversy were sold under the decree of the Probate Court, is as follows: "The whole property of the decedent is charged with the payment of his debts, and the same must be sold for that purpose, if necessary, except in the cases provided for in the next section." The next section refers to exempt property and is not material to the issues in this case. In order to invoke the jurisdiction of the Probate Court for the sale of the lands there must be a petition filed by the administrator or executor of the estate, praying for the sale of lands, to pay debts, and alleging one of the grounds prescribed by Section No. 1755 of the same Code, which is as follows: "In cases of intestacy, lands may be sold by the administrator for the payment of debts: 1st, when the personal property is insufficient therefor; 2d, when it is more beneficial to the estate to sell lands than slaves."

The Petition.

Some faint attempt is made by the opposing counsel to question the sufficiency of the petition in the Probate Court to confer jurisdiction for the sale of the lands in controversy. The petition is, without doubt, sufficient. It is as follows: "Your petitioner, Jas. F. Grant, the administrator of all and singular the goods and chattels of the estate of Sam'l P. Hudson, deceased, most respectfully states that his intestate died possessed and owner of real estate situated in the county of Calhoun, as follows, to-wit:" (describing the lands in controversy, with others,) "Your petitioner avers that the personal property of said estate is insufficient to pay the debts of said estate, and in order to pay said debts it is necessary to sell the said real estate." * * The remaining averments of the petition are in the usual form, setting out the names of the heirs and distributees of the estate, asking that they be made parties, and that a guardian *ad litem* be appointed for the minor heirs, and praying for an order to sell in this language: "That your Honor grant an order to sell said real estate to the highest bidder, on credit of one and two years, with interest from date of sale, subject, however, to the widow's right of dower to the said real estate."

In testing the sufficiency of the petition in this case it must be remembered that the question arises collaterally. It is by no means clear that the petition in this case was demurrable; there can be no doubt, however, that it is sufficient upon a collateral attack. In King vs. Kent (29 Ala. 553) the Court says: "When the peti-

tion is directly assailed, the question is one of pleading, and the intendments are made against the pleader; but a different rule prevails when the proceedings have gone into a decree, under which rights of property have attached. Then every reasonable intendment in the construction of the language of the petition, must be in favor of the validity of the paper. Under a different rule, designing persons might withhold objections for amendable defects until after the proceedings had terminated, and the rights had attached, and then vitiate the whole proceeding; thus converting a court of justice into a snare." See also DeBardelaben vs. Studemire, 48 Ala., 643; Wright vs. Ware, 50 Ala., 549; Doe vs. Hardy, 52 Ala., 291; Bibb vs. Bishop Cobb's Orphan Home, 61 Ala., 326; Pollard vs. Hanrick, 74 Ala., 334.

The plaintiffs in this case were parties to the proceedings in the Probate Court for the sale of the lands in controversy. They neither demurred to the petition nor appealed from the order of sale. They cannot now, in a collateral proceeding, set aside and defeat the title acquired by the sale.

The case of Gayle vs. Johnson [72 Ala. 254] is an authority which, it is submitted, would sustain the petition in this case, even upon a direct attack by demurrer. In that case the language of the petition is identical with the case at bar, and is as follows: "That said decedent died intestate; that the personal property of the estate is insufficient to pay the debts thereof, and that the lands of said estate, which it is desirable to sell to pay the debts thereof, are an undivided one-fifth in-

terest in the estate of Mrs. L. Gayle, deceased, who is the mother of the said L. R. Gayle,—and particularly describing the lands." In that case the Court held the petition sufficient, even on demurrer. In the opinion this language is used: "In a proceeding of this character, in the Court of Probate, to subject lands devised or descended, to the payment of debts, the formal pleadings pertaining to courts of law or equity, are not contemplated, nor are they usual or practical. The application of the personal representative is sufficient, if, in general terms, it avers the existence of debts against the ancestor; no description of the debts, no averment of the persons to whom they are due, or of the time of their creation, or when payable, is necessary. Any such averment would render the application unnecessarily prolix, and would be inconsistent with the simplicity of the proceedings prescribed by the statute.

The Order of Sale.

The proceedings in the Probate Court for the sale of the land in controversy to pay the debts of Samuel P. Hudson, deceased, are perfectly regular, and in strict compliance with the statutes of Alabama, down to the *order of sale*, and the defendants contend, that there is no irregularity in the order of sale; at least, none that can be made available on a collateral attack. The only objection urged against the order of sale is the failure to show affirmatively that testimony was taken as in Chancery cases, as provided by Section 5 of the Acts of Alabama of 1853–4, p. 55, which is as follows: "And

be it further enacted, that no order for the sale of land belonging to any estate when there are minors, or persons of unsound mind interested in such estate, unless the Probate Court shall have taken proof by deposition, as in Chancery proceedings, showing the necessity of such a sale, and this proof shall be taken, whether the allegations in the petitions are denied or not, by the guardian, or other person, appointed by the court to represent the minors, or persons of unsound mind, and any order of sale, and sale made without a compliance with the requisitions of this act, shall be wholly void."

A careful examination of the language used in the decree, in the light of the decisions of the Supreme Court of Alabama construing this statute, it is believed, will remove this objection. The decree of the Court is in the following language:

"February 15th, A. D. 1866.

"This being the day set by a former order of this Court, made the 9th day of January, 1866, to hear and determine upon the petition of James F. Grant, the administrator of the estate of Sam'l P. Hudson, deceased, for the sale of the following described lands belonging to said estate, for the purpose of paying the debts of said estate, to-wit (here setting out the lands in controversy, together with other lands of said estate): "And comes the said Grant and prays that his said petition and application, for the sale of the above described land, be heard and determined at this term of the Court. And it appearing to the satisfaction of the Court, that notice of the filing of said petition, and of the day set

for the hearing of the same, has been given according to law, and thereupon the Court proceeds to hear and determine upon the facts of said petition. And comes into Court L. W. Cannon as the guardian of the minor heirs of said decedent, and denies each and all of the allegations of said petition, and thereupon said administrator introduces witnesses to sustain the same. And, after hearing all the testimony in the case, the Court is of the opinion that the allegations of said petition are fully sustained by the evidence in the case. It is therefore ordered and decreed by the Court that the above described lands, as belonging to said estate, be and the same are hereby directed to be sold for the payment of the debts of said estate, subject, however, to the widow's dower interest in the same. It is further ordered that said lands be sold on a credit of one and two years, with interest from the date of sale. It is further ordered that said administrator, after advertising the sale of said land in the Jacksonville Republican for three weeks, giving the time, place and terms of sale, proceed to sell the said lands known as the Steam Mill tract at Blue Mountain, and the Nunnelly place and town lots, before the court house door, in the town of Jacksonville, Ala.

"It is ordered that said lands be sold at public auction to the highest bidder, and that said administrator secure the purchase money for said land by taking notes, with two good and solvent sureties. * * *"

We insist, upon a collateral attack, that the order of sale is sufficient, and shows the necessary jurisdictional

facts. It is well settled, even where the language in the decree is equivocal and of uncertain meaning, if, upon any interpretation, the words used can be made to sustain the order, the court will adopt that construction that will sustain rather than defeat the jurisdiction of the Court. In King vs. Kent (29 Ala. 554,) it was held that an allegation of import equivalent to that required by the statute will sustain the jurisdiction; and in determining whether the allegation is of equivalent import, the Court should select the signification of words favoring the validity of the order. In that case, after a most careful consideration of the point, the Court said: "Authority, public policy and justice, alike, require that, in determining whether the record does disclose the jurisdictional facts, we should construe the language of the record *most favorably for the maintenance of the decree*, and, where words are susceptible of two or more constructions, adopt that which will sustain the decree."

In the case of Carter vs. Waugh (42 Ala. 452), the language used by the Court is very similar to that in the case at the bar. The language there used is: "And the Court having read the evidence of the witnesses aforesaid submitted, is satisfied from the said evidence of the witnesses aforesaid, that a sale of the lands described in the petition, was necessary in order to make an equitable division among the heirs of said deceased." The order in this case was sustained, though directly attacked in the Probate Court by a motion to vacate.

In Pettus vs. McClanahan (52 Ala. 55), the Court, in

speaking of the case just cited, uses this language: "In Carter vs. Waugh (42 Ala. 452), which was an application of the character we are considering, the vacation of the decree of sale was sought on this, among other grounds: 'That the proof by deposition was not regularly or validly taken and returned.' The record did not disclose, except by implication, and not by positive affirmation, as in this case, that the proof of the necessity of sale had been taken by deposition, as in Chancery cases. The depositions found in the record were certainly irregularly taken, and did not appear to have been taken and certified by the commissioner. The court says: 'It is true that the depositions appear upon their face to have been irregularly and imperfectly taken and returned to the Court of Probate, but this does not render the order of sale void. Besides, the order of sale judicially ascertains every matter necessary to show their regularity as against an attack of the kind made in this case.'"

In Bibb vs. Bishop Cobb's Orphan Home (61 Ala. 326), the order of sale recited the filing of the petition, and that the guardian *ad litem* appeared and denied in writing the allegations of the petition, and then proceeds: "And E. M. Kerr, heretofore appointed commissioner to take testimony in said cause, having reported the same, which by order of the Court is approved and ordered to be filed among the papers of the said estate; and the Court proceeded to examine said testimony, and from said testimony it appears to the Court that said lands cannot be equitably divided among the heirs at

law, without a sale thereof; and also that it would be more to the interest of said minors to sell said property, and reinvest the proceeds of the same in some other property, as bonds, bills of exchange, &c." There were minors interested in the estate, and it was contended that the order did not show that proof had been taken, as in Chancery cases, to show the necessity of the sale. The Court said, quoting from one of its previous decisions: "Testing the recitals of this record by the presumptions extended to judicial proceedings when collaterally attacked, we feel justified in declaring that it appears from the record that depositions proving the necessity of sale, were taken, as in chancery proceedings. Hence, the argument founded upon this supposed defect, falls to the ground."

Upon the authority of the foregoing cases it is manifest that the order of sale in the case at bar is sufficient, on a collateral attack. The decree uses this language: "And thereupon the administrator introduces witnesses to sustain the same, and after hearing all the testimony in the case, the Court is of the opinion that the allegations of the said petition are fully sustained by the evidence in the case."

In construing the language used, it must be held to mean that in introducing witnesses to sustain the petition, the administrator offered *legal*, and not *illegal* testimony, in other words, that the testimony of the witnesses was introduced by deposition, as required by law, and not orally, as is argued by opposing counsel. There is nothing in the language used to suggest that

the witnesses were examined orally, and every intendment will be to the contrary. Again, where the Court says: "And after hearing all the testimony in the case, the Court is of the opinion that the allegations of the petition are fully sustained by the evidence in the case," it must be intended that the evidence considered by the Court was legal, and not illegal testimony; especially is this so when the record shows that the evidence alluded to was *in fact taken by deposition as in chancery cases.* In this connection the language of our Court in Wright's Heirs vs. Ware (50 Ala. 549,561) is of special application: "There are but two modes of taking depositions known to our law—one in proceedings at common and one in proceedings in chancery. The recitals of this record are as consistent with the hypothesis that the depositions were taken as in chancery proceedings as that they were taken as in proceedings at common law. This being true, we must adopt that hypothesis which will support and preserve, not that which will invalidate the proceedings."

Counsel assert, in the brief, that the recital in the order "that witnesses were introduced" cannot possibly be construed to mean deposition. We have already noticed that this is the mere assertion of counsel, and not supported by any authority; on the contrary the assertion is directly in the teeth of Carter vs. Waugh (42 Ala. 452), upon which we rely. In that case the recital of the order of the court is in this language: "And the court having read the evidence of the witnesses aforesaid submitted, is satisfied from the evidence of the

witnesses aforesaid that a sale of the land described in the petition is necessary," etc. Here, then, is the same identical language, where witnesses were introduced to sustain the petition or the sale of lands. Opposing counsel say that "witnesses" can not possibly mean "deposition," but, unfortunately for the position assumed by them, the Supreme Court of Alabama, in the case referred to, held otherwise. The court, in passing upon the validity of the order in this case, said: "The order of sale is not void, if Satcher vs. Kirkland, admr. (41 Ala. 26), is to stand as authority. It has been, on several occasions, cited and reaffirmed, and is now again recognized. It is true that the depositions appear upon their face to have been irregularly and imperfectly taken and returned to the Court of Probate, but this does not render the order of sale void. Besides, the order of sale judicially ascertains every matter necessary to show their regularity as against an attack of the kind made in this case."

Again, it must be remembered that the transcript of the records offered in this case show that depositions were in fact taken, as in chancery cases, to prove the necessity of sale. The depositions of two witnesses are recorded in the Probate Court as a part of the proceedings of said court, for the sale of the lands in controversy in this case. It is submitted that the recital in the order of sale, that "witnesses were introduced to sustain the allegations of the petition," and that "the court is of the opinion that the allegations of said petition, are fully sustained by the evidence in the case," is a suffi-

cient reference to the depositions on file, to sustain the order. In this case we invoke the language used by the court, in Goodwin vs. Sims (86 Ala. 108): "As the entire record imports absolute verity, the recitals of the decree may be explained, limited or qualified, by other parts of the record. The entire record may be looked to, for the purpose of ascertaining the jurisdictional facts, when there is no finding by the court; for jurisdiction is acquired from the facts, as they appear in the entire record." In this case, it will be observed, without the aid of the depositions found in the record the order of sale was void, but the court held, that in order to sustain the order it was proper to look to the *entire* record, and the order of sale was consequently sustained on a collateral attack.

No Departure from the Order of Sale.

The administrator reported that he had received the full amount of the purchase money, in cash, and this report is confirmed by the court, which, upon a collateral attack, is certainly conclusive against the parties to this record. The proceedings in this respect are perfectly regular; but if not, the irregularity could not be taken advantage of upon a collateral attack. The report of the administrator, and the decree of the court confirming the report, are conclusive, and would be so, however irregular. In Lowe vs. Guice (69 Ala. 83). the court says: "The order of confirmation is a decree of the court rendered on inquiry, all parties in interest having the opportunity of being heard, and of contesting or of supporting the sale. Such a decree rendered

by a court of competent jurisdiction, especially a court of exclusive jurisdiction, in the absence of fraud, must be final and conclusive of all facts necessarily involved in its rendition, when not assailed on error or appeal in appellate jurisdiction." And see Warning vs. Lewis (53 Ala. 615.) Opposing counsel concede in effect that the petition to sell the lands in controversy was sufficient and gave the court jurisdiction. I have shown that the order of sale is sufficient upon collateral attack. Section 1769 of the Code of 1852 in force at the time of this sale and now section 2123 of the present Code (1886) of Alabama provides: "Whenever the court is satisfied that the order of sale was fairly conducted, and the land sold for an amount not greatly disproportionate to its real value, and the purchase money is sufficiently secured, it must make an order confirming such sale."

It is conceded that the sale was made in accordance with the terms of the order, the purchase money was paid in cash, and the sale regularly reported to the Probate Court, and duly confirmed. Here then is a substantial compliance with the statutory laws of this State of the sale of lands for the payment of debts. The purchaser immediately entered into possession, and she and those claiming under her, as appears from the agreed statement of facts upon which the case is submitted, have continued to hold, claiming to own the same in fee simple, under said deed from said administrator, for over twenty-four years. Without regard therefore, to the strict regularity of sale after so great lapse of time, in order to quiet possession so long con-

tinued under claim of ownership, the court will presume I submit, in favor of the purchaser and those claiming under her, that the legal title of the heirs had, in some legal mode become divested.

The Statute of Repose.

It was not the life estate that was sold under the proceedings in the Probate Court, nor did the life tenant make the sale. The jurisdiction of the Probate Court was invoked to subject the *reversionary* interest of the heirs, in the lands in controversy, for the payment of debts; and the purchaser at this sale did not claim under the life tenant, but by a title paramount to that of the life tenant, as well as the title of the reversioner. If the jurisdiction of the Probate Court was properly invoked and its proceedings were sufficiently regular, both the possession and the title of the heirs was intercepted and a perfect title as well as possession would have vested *eo-instanti* in the purchaser. Nelson vs. Murfree, 69 Ala., 598; Calhoun vs. Fletcher, 63 Ala., 574; Tyson vs. Brown, 64 Ala., 244; Sanford vs. Dunklin, 71 Ala., 594; Wells vs. Elliott, 68 Ala., 183; Lee vs. Dunny, 68 Ala., 98; McCullough vs. Wise, 57 Ala., 623. In that case there would be no occasion to invoke the doctrine of prescription or the statute of repose. This salutary principle, so firmly imbedded in our jurisprudence is not intended to protect perfect titles. Such titles need no protection. It finds its proper field of operation in cases where a substantial title has been acquired, but for some reason is imperfect and incomplete. The objection to defendant's title in this case is

purely technical; the purchase money was paid and the conveyance made, and the possession continued in good faith for over twenty years. The heirs at law of Samuel P. Hudson, who are the plaintiffs here, were parties to the proceedings in the Probate Court and received the benefit of the purchase money; without ever having offered to make restitution, they seek to recover the land upon an alleged technical defect in the defendant's chain of title. It is submitted that the attempt is unconscientious, and if the contention be true it comes squarely within the mischief intended to be remedied by the statute of repose.

The authorities are numerous, and in point to show that after such lapse of time the court will not only presume a grant, but will also presume the existence of records, although it does not appear that such record ever existed, and in fact will presume almost *anything* necessary to quiet such long possession.

The decision of the court in Stevenson's heirs vs. McReary (12 Sm. and Mar. 9) which, like the case at bar, was an action of ejectment for the recovery of lands against the purchaser at a probate sale, is thus stated in the head note: "While the rule is well settled that the probate courts cannot order a sale unless everything necessary to give them jurisdiction of the person and of the subject matter appears on the records; yet, when the administrator made a sale of an estate of his intestate, gave the purchaser a deed, in which he recited that the

steps required by law had been taken, and placed the purchaser in possession; and thirty-four years afterwards the heirs of the intestate brought an action of ejectment for the lands; held, that the court would presume, from the lapse of time, and the defendant's undisturbed possession, that the administrator had complied with the requisites of the law, though in some particulars the records of the probate court *did not show that he had done so.*"

In Wyatt vs. Scott (33 Ala. 313) it was held, in an action brought by an administrator *de bonis non* against one claiming under a purchase at a public sale by the administrator in chief, that the regularity of the sale and the order under which it was made may be presumed from the lapse of twenty years, accompanied by continuous possession under the sale for that length of time. The records of the court, in this case, were produced, and failed to sustain the validity of the sale, but the court presumed, after such lapse of time, that sufficient records to sustain the sale had once existed and had been lost or destroyed, although there was no evidence of the destruction of the records. In this case after the lapse of twenty years the presumption in favor of the validity of the title was conclusive, and the court cited its previous decisions as settling a rule of property in this State, to that effect.

In Grant's Administrator vs. Phillips (23 Ala. 275) the legal appointment and qualification of an executrix was presumed after the lapse of twenty years without the production of the record, although the existence of

such appointment was essential to the validity of the title claimed by the defendant.

In Wilson vs. Holt (83 Ala. 529) it was held that the court would presume, after twenty-two years, an act of the Legislature granting or confirming a divorce, even though there was absolutely no evidence upon the records to warrant such presumption, an act of the Legislature at that time being essential to the validity of the divorce.

In Battles vs. Holley (6 Me. 121) to sustain the possession of thirty years under a defective probate sale, the court presumed the appointment and authority of the administrator, and also the order to sell. In Freeman vs. Thayer (33 Me. 76) the same court held that after thirty years the court will presume almost anything to sustain a defective tax sale of land. In Segee vs. Thomas (3 Blatch: 11) it was held that after the lapse of twenty-four years, and continued possession under a probate sale, the court, in order to sustain the sale, would presume the validity of the order authorising the sale. In Desverges vs. Desverges (31 Ga. 753) it was held that an administration would be presumed after twenty years in order to sustain a title, although there was no sufficient record evidence of such administration.

In Thomas vs. Hatch (3 Sumner 179), Judge Story, in reply to the argument that no commission was produced from the Probate Court, showing the guardianship of a *non compos mentis*, which in that case was essential to be shown, says: "It is true that no commis-

sion is produced *or can now be found on the Probate record,* but other papers are produced" (an inventory of the estate and account settled and allowed.) "Under such circumstances there is certainly strong *prima facie* evidence after such a lapse of time, to supply a direct proof of the probate appointment, and we all know how loosely, in those times, the records of a Probate Court were kept." And Mr. Best thus sums up an exhaustive review of the authorities: "There is hardly a species of act or document, public or private, that will not be presumed in support of possession." Best on Presumption, 98 sec. 109.

Mr. Wharton lays down the doctrine broadly, that where the title is substantially good and there has been long possession, missing links, even of a formal and substantial character, will be presumed, and adds: "To tax and administration sales this presumption has been held applicable. But there must be possession taken under the sale, otherwise, it may exercise no curative effect." 2 Wharton, Ev. Sec. 1353–1347; Pejebscut vs. Ransom, 14 Mass. 145; Austin vs. Austin, 50 Me. 74; Coxe vs. Duerenger, 78 Pa. St. 271.

The importance of such presumption is stated with great emphasis and fullness of reference to authorities by Mr. Justice Kennedy, in Bellas vs. Levan, (4 Watts, 294) which he sums up in this conclusion: "It is too obvious not to be seen and felt by every one how very important it is to the best interests of the State that titles to lands, instead of being weakened and impaired by lapse of time, should be strengthened, until they

shall become incontrovertibly confirmed by it." And, again, in Foulk vs. Brown (2 Watts, 214-215), Mr. Justice Sergent said: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. Justice can not be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of the past age and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors."

Without undertaking to review the authorities at length, it will be sufficient to refer the court to them:

Attorney-General vs. St. Cross, 17 Beav. 435; Hill vs. Lord, 48 Me. 83; Jackson vs. McCall, 10 Johnson 377; Winkley vs. Kamie, 32 Me. 275; Breckenridge vs. Waters' Heirs, 4 Dana, 620; Warner vs. Henley, 48 Pa. St. 190; Burke vs. Hammond, 76 Pa. St. 172; Lackawanna Iron Co. vs. Fails, 55 Pa. St. 90; Heft vs. Gebhart, 65 Pa. St. 510; Coxe vs. Duerrenger, 78 Pa. St. 271; Gray vs. Gardner, 3 Mass. 398; Pejepscut vs. Ransom, 14 Mass. 145; Coleman vs. Anderson, 10 Mass. 105; Perkins vs. Fairfield, 11 Mass. 227; Prop'rs of Church vs. Ballard, 2 Me. 363; Bolliver Manf. Co. vs. Neponset Manf. Co., 16 Pick. 241; Knox vs. Jenks, 7 Mass. 488; Watson vs. Mulford, 21 N. J. Law, 500; Denn vs. Mardis, 7 N. J. Law, 6; Richman vs. Lippencott, 29 N. J. Law, 44; Denn, Watson et al. vs. Kelly et al. 16 N. J. Law, 517; Carter vs. Tinnicum Fishing Co., 77 Pa. St. 310.

These authorities, with the cases cited on the principle brief, settled beyond any controversy that the court, after such lapse of time, will presume an order to convey, and if necessary, would presume an order of sale. If the court would presume the appointment and qualification of an executrix, in the absence of an order sustaining the appointment, as was done in Grant's admr. vs. Phillips *supra*; or would presume in favor of the regularity of a sale and the order under which it was made, as was done in Wyatt vs. Scott, *supra*; or an order showing the appointment of a guardian, in the face of the records of the court, negativing the appointment, as was done by Judge Story, in Thomas vs. Hatch, *supra*; or an act of the Legislature granting or confirming a divorce as was done in Wilson vs. Holt, *supra*; or an administration, an appointment as administrator, and a sale and conveyance by such administrator, as is said would be done, in McArthur vs. Carrie's admr. (32 Ala. 92), and the numerous cases cited, *supra*,—it seems idle to say that the court, in this case, would not presume an order to convey, or, if necessary, a valid order of sale authorizing the conveyance. It will be observed on an examination of the authorities, that the nature, extent, or violence of the presumption, if you please, does not enter into the consideration. The principle is, that the court will presume whatever is necessary to protect the title. If a deed is necessary, a deed will be presumed; if a record or order of court is necessary, an order will be presumed; if a bill in chancery is necessary, it will be presumed. "There is hardly a species of act or document, public or

private, that will not be presumed in support of possession."—(Best on presumption, cited *supra*.) The rule is founded in the interest and peace of society, and repose of titles, essential alike to good government, prosperity and industrial development.

"A right acquired by prescription is, in all respects, as perfect as one acquired by grant. It has the same validity and force." Weed vs. Keener, 60 Vt. 74; 6 Am. St. Reps. 93. Also Arbuckle vs. Ward, 29 Vt. 43; 3 Washburn on Real Property, 5 Ed. 59. "The theory upon which a title by prescription vests, is that it presupposes a grant without requiring any further evidence of its having been made, *then the requisite term of enjoyment*, and where the extent of the use is the evidence of the extent of the grant." 3 Washburn on Real Property, 5 Ed. 59. "An open, notorious and adverse possession for twenty years would operate to convey a complete title, as much as any written conveyance, and such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed." Winthrop School District vs. Benson, 31 Me. 384, 385; 3 Washburn on Real Property, 5 Ed. 176.

In Bozeman vs. Bozeman, 82 Ala. 389, the doctrine of prescription or repose, as applied in Alabama, is very clearly stated. Sommerville, Justice, speaking for the court, says: "We have, in this State, by a long series of decisions, established the rule, that the lapse of twenty years will operate as a positive bar to the enforcement of every character of legal right in the

courts of this State, unless there has been, within that period of time, a recognition or admission of some material fact on which the right in question may be adjudged to rest, and which, therefore keeps it alive and in force. The rule is one of presumption, based on the broad doctrine of prescription, and is not to be rebutted. It has in view the peace and security of society, and is applicable, as often held, to all human transactions, which are open to judicial investigation. The doctrine is broader and more comprehensive than a mere statute of limitations, although based on analogous principles, as we have above said, of repose to society."

The Possession is Adverse to the Plaintiffs.

The relation and attitude of the parties to the record shows that the possession of the purchaser at the Probate Court sale was necessarily adverse to the plaintiffs. It was the interest of the plaintiffs in the land in controversy that was sold, that was what the purchaser bought, and what she paid for. Suppose the remaindermen, having a vested interest, had themselves made the sale, and had received the purchase money? Is it possible to conceive in such a case as that, the holding of the purchaser would not have been adverse to the seller? In the case at bar the Probate Court acted under a statutory power, and was, in effect, the legally constituted agent of the plaintiffs, in making the sale. The plaintiffs received the benefit of the proceeds of the sale, and so far as the character of the holding by the purchaser is concerned, it is the same as if the plaintiffs themselves had sold and conveyed, and received the purchase money.

The case is very different from that of a sale made by a life tenant. There the remainderman is not a party to or effected by the sale. It would be unjust in such a case to allow his right to be prejudiced thereby. But here the remainderman is a party to the sale, and received the benefits of the proceeds of the sale, and stands by for over twenty years, permitting the purchaser and those claiming under her, to use and treat the property as owners. If the proceedings in the Probate Court were regular and valid in every respect, the title vested *eo-instanti*. If irregular in any respect, after so long an acquiescence and adverse holding, the statute of repose operates upon the imperfect conveyance, imparting to it validity. Opposing counsel insist that the possession of the purchaser was not; and could not become adverse to the reversioners until death of the life tenant. There might be some force in this position if it were true that the reversionary interest could not be sold, and was not subject to sale until the termination of the life estate. The logic of the position assumed by counsel is, that where the remaindermen themselves sell, the conveyance does not become operative to pass their interest until the termination of the particular estate! This we know, is at war with well settled principles. The sale of a vested interest in remainder passes the title and interest of the reversioner immediately to the purchaser; and so an imperfect sale of such interest, where the purchaser takes possession, creates the same character of adverse holding as if the sale had been perfect, and such an imperfect conveyance; by the lapse of time, under the statute of repose will become valid.

Matthews vs. M'Dade.

The case of Matthews vs. McDade (72 Ala. 377), is in point, and is decisive upon this, as well as other questions presented in the case at bar. In that case, the situation of the contending parties was identical with the parties to the present record. The suit was brought by remaindermen, who were not barred by the ordinary statute of limitations of ten years, to recover possession of land, held under a sale, claimed to be void, for over twenty years. The land was purchased by William McDade, *who was one of the life tenants, occupying a position identical with Mrs. Hudson, the purchaser in the case at bar.* It was contended in that case, as it is contended in this, that the cause of action of the remaindermen did not accrue until the death of the life tenant, and the possession of the purchaser was not adverse until the termination of the particular estate. The court held otherwise, using the following language: "More than twenty years has elapsed since the execution of this power, and the possession of the vendee and those claiming under him, *has been open, notorious, adverse and uninterrupted since then.*"

Here, then, is the issue sharply defined: Opposing counsel say that possession under an imperfect sale of the interest of remaindermen is not adverse until the termination of the particular estate. The Supreme Court of Alabama says, that so far as the operation of the statute of repose is concerned, it is adverse from the *date* of sale.

Evidently impressed with the belief that this case

was in the way of their recovery, counsel have been industrious in the effort to break its force, or at least, avoid its effect.

From the facts of the case, it appears that Alexander McDade was authorized, *as trustee*, in the deed made by the original grantor, to sell the land in controversy, upon certain conditions. The grantor, about the time the deed was executed, made a will, in which reference was made to the deed, and the deed, it seems, was probated with the will as a part thereof. The deed authorized the trustee therein named, Alexander W. McDade, who was afterwards appointed executor of the will, *within a reasonable time after the death of the grantor*, to sell the land for the purpose of distribution, according to the terms specified at length in the body of the instrument. The widow dissented from the will, and the executor decided, on this account, that the trusts could not be executed as directed by the grantor, and applied for an order of court to sell the lands in controversy, for distribution; *at least, this is the reason which the executor himself gives*, in his petition asking for an order of sale.

The petition of the executor to sell the lands for distribution was filed September 23, 1850. Upon this petition an order of sale was granted, which recites the taking of testimony, showing the necessity of sale for the purpose of making distribution, and directing the executor, Alexander W. McDade, to proceed to make the sale. On the 6th of January, 1851, the executor reported to the court that he had sold the lands in con-

troversy on the 18th day of December, 1850, to William McDade, stating the price at which the land was sold, and that the purchaser *had complied with the terms of the sale.* On the filing of this report the court made an order confirming the sale, and directing the executor to make title to the purchaser. In June, 1853, the executor made a final settlement of his accounts and a distribution of the estate, producing the receipts of the several heirs and distributees for the amount due them, respectively, and the decrees in their favor were entered satisfied. The deed from the executor to William McDade was not executed until December 27, 1855.

The court was to determine from the foregoing facts whether the deed executed by the executor was referable to the power granted by the Probate Court or the power supposed to be conferred by the original will. If the sale was under the order of sale obtained in the Probate Court it was void since the court had no jurisdiction to sell lands where there was a will or deed giving such power. Brock vs. Frank, 51 Ala. 85; Mosely vs. Tuthill, 45 Ala. 621. If the executor supposed he was authorized to sell under the will, it would seem strange that he applied to the Probate Court for an order of sale. On the contrary, he applied to the court for an order of sale, because, as stated in one of his petitions the widow had dissented from the will, and the trusts of the will could not, on that account, be executed. That he was acting under the power conferred by the Probate Court, is further indicated by the fact that he reported the sale to the court, and awaited the order of the court, con-

firming the same and directing him to make titles: In further confirmation of this, we find that the executor made a final settlement and distribution of the estate in June, 1853, accounting for all funds received by him, and making distribution thereof among the heirs and distributees of the estate, although a formal conveyance to the purchaser was not made until two years afterwards, the deed bearing date, December 27th, 1855. From this statement of facts it is manifest, except as aided by the presumption indulged after great lapse of time, the execution of the power could not be referred to the authority conferred by the will. Counsel insist the court determined that the power conferred by the will had been properly executed, without regard to the lapse of time and the adverse holding. That such was not the decision is shown by the following paragraph from the opinion: "We are to determine whether this sale and conveyance are referable to the power (conferred in the will), and were intended as an *execution* of it. If so, they operated to cut off the *remainder* created in the appellees, *and possession under the deed for over twenty years, with claim of adverse possession, has matured into a good title.*" From the language here used, it is evident that it was not intended to decide that the sale could be regarded as a valid execution of the power, except as aided by the presumptions indulged after the lapse of time. It was the sale under the power, accompanied by possession for over twenty years, with claim of adverse possession, aided by the presumptions indulged in its favor after such

lapse of time, that matured the interest thereby acquired, as declared by the court, "into a good title."

The learned Justice, in delivering the opinion of the court, does say he was influenced to infer the intention to execute the power conferred by the will, because no report was made of the sale, to the Probate Court, and no authority to convey was conferred by the order of the court. A reference to the reported facts of the case, as above stated, will show that in this he was mistaken. The property was sold by the executor under an order of the court, to William McDade, and was promptly reported to said court by said executor, giving the price at which it was sold, and stating that the purchaser had complied with the terms of sale. This report was returned to the court, and in all things ratified and confirmed, and the executor was directed to make a deed to the purchaser. Except as aided by the statute of repose, it was therefore impossible to sustain the sale as a valid execution of the power, notwithstanding the facts of the case might show the sale to be imperfect. After such a lapse of time, the court would presume whatever was necessary to sustain the title. That such was the decision of the court, is manifest from the language already quoted: "And while the statute of limitations can not be invoked to bar the claim of the remaindermen, if the power in question has never been so executed as to legally divest their title, yet a presumption is raised by this lapse of time, upon another principle, favorable to the repose of appellant's title. Twenty years is a period of time beyond which the courts are

indisposed to permit past human transactions to be disturbed by judicial investigation." The principle here declared has a special application to the case at the bar, in that a valid and effective execution of the power contained in the will, would have cut off the remaindermen, and being an *imperfect* execution of the power, it was nevertheless sufficient to create an adverse holding, such as, under the statute of repose, would ripen into a good title by lapse of time. And so in the case at bar, conceding that the power of sale in the Probate Court was imperfectly executed, in that the conveyance by the administrator was made without an order of court, still, the remaindermen were parties to the proceedings, and their interest was sold, and the court, after such great lapse of time, will presume in favor of the valid execution of the power.

Doe Ex. Dem. Gosson vs. Ladd.

The case of Doe ex. dem. Gosson vs. Ladd, 77 Ala. 223, is another case directly in point upon the issue involved here. That was an action of ejectment brought by the plaintiffs, who were remaindermen, and within less than ten years after the termination of the life estate. The defendants claimed under an imperfect sale made by a trustee, over twenty years before the commencement of the suit. The relation of the parties, it will be seen, therefore, was precisely the same as in the case at bar. In that case it was contended that the possession was not adverse to the remaindermen, until the termination of the particular estate. The court held otherwise. Mr. Justice Clopton, speaking for the court, said: "More

than thirty years elapsed after making the conveyance, before the commencement of the suit, during all of which time the defendant and those under whom they claimed, have been in *open, notorious and adverse possession, claiming title.*"

Opposing counsel say, in reference to this case, that the court held that the deed executed by the trustee and others was referable to a power of sale reserved to the grantor in the original deed under which the remaindermen claimed. Conceding this, how did the court reach this conclusion? The facts of the case showed that the grantor had reserved the power of sale to himself, and had been removed and a new trustee appointed. The lands were sold under a decree by the Chancery Court against the original trustee, who owned an undivided one-half interest in the lands in controversy, which decree was not signed, and did not affect the interest of the remaindermen, but was a personal decree against the defaulting trustee, John P. Nicholas, and was purchased by Gueringer, the new trustee, in trust for the life tenants. Afterwards the persons for whom this purchase was made, sold and conveyed the lands in controversy, in fee, the trustee Gueringer joining in the deed as trustee. From this statement of the facts, it is manifest that Gueringer, uniting as trustee, with the *cestuis que trustent* claiming under the chancery sale, could not properly be treated as an execution of the original power of sale reserved by the grantor, John P. Nicholas. Such a reference, however, was essential to the validity of the deed, and after such a great lapse of time the

court ruled that it should be so referred. That such was the decision of the court is manifest from the following language from the opinion: "The period of time had expired, after which it is the policy of the law to quiet past transactions, and when the courts will indulge for this purpose all reasonable presumptions. After such a lapse of time, and such uninterrupted possession, it is permissible to invoke the rule of presumption in favor of a due execution of the power of sale, and of the regularity and validity of a conveyance, sufficient in law to pass the estate and title of the grantor."

Counsel further attempt to distinguish these cases and says that in this and the one preceeding it, the trustee was clothed with the legal title as to the remainderman as well as the life tenant. This is not true as to Gosson vs. Ladd, because the terms or duration of the trust did not extend to the remainderman. This is made clear by the court in the opinion: "The corpus of the estate remained vested in the trustee, the life tenants being entitled only to the interest or use. But the active duties of the trustee continued only during the life estates. When they fell the trusts fell with them. The trustee had no right or power to hold for the use of the remainderman, as to them he had no duties to perform and no office to fulfil,—not even to convey. They were in by virtue of the deed." Doe ex. Dem. Gosson vs. Ladd, 77 Ala. 223, 232. Nor is the suggestion of any consequence as applied to Matthews vs. McDade, for there the litigation arose in a court of chancery where the rights of the parties in equity were adjudicated

irrespective of the status of the legal title. The truth is in each of these cases, there was a defective execution of a power of sale, and the court holds as was held in the case at bar, that the doctrine of repose operates upon the sale to perfect it, and after great lapse of time, in order to quiet long continued possession the court will presume whatever is necessary to perfect the title.

Kelly vs. Hancock.

In Kelly vs. Hancock, 75 Ala. 229, the reversionary interest subject to the widow's dower, had been sold by proceedings in the Probate Court. The purchaser of the reversionary interest also purchased the life estate of the widow, thus uniting in himself the life interest and the reversionary interest. He received, however, no deed to the remainder interest, nor the life estate. It was held, after twenty years of uninterrupted possession, that the court would conclusively presume payment of the purchase money, and that the conveyance had been made; and this, notwithstanding the fact that it plainly appeared that no conveyance had been made.

M'Arthur vs. Carrie's Administrator.

The case of McArthur vs. Carrie's Administrator, 32 Ala. 75, is one of the few Alabama cases cited by us, which opposing counsel, in their brief, recognize "*as good law*, and as having been followed in subsequent cases in this State, until the rule established by that case, has become a rule of property in Alabama." It would be impossible to state the rule of presumption under the doctrine of repose more broadly, or with greater force, than it is declared by the court in this case. It is here

declared, that after an adverse possession of twenty years, the presumption in favor of a perfect title becomes conclusive, and the courts will not entertain an application to disturb it. In the opinion Judge Stone says: "Whenever the facts of a case are clear and uncontroverted, the rights of parties are, or should be, fixed and uniform. Where there remains no fact to be found or conclusion to be drawn from contested and intermediate premises, there is no use for a jury, for the law determines the rights of the parties." The court in this case holds that a mere possession of twenty years raises a *prima facie* presumption of title. An *adverse* possession for such length of time, under a claim of right, creates a conclusive presumption of title, which, however invalid in its inception, can not be defeated after such lapse of time. This conclusion is clearly stated in the following language: "This *prima facie* case may, of course, be overturned. It can not be done by proving that the title was, in its inception, defective. Proof, to be effectual for this purpose, must be addressed to the *character* of the plaintiff's possession, either in its *acquisition* or *use*; must tend to show that such possession is not inconsistent with the plaintiff's right; or some other excuse independent of original defect of title, must be given for the seeming long acquiescence." Here it will be seen that evidence to rebut the presumption of title must tend to show that the possession relied on is not inconsistent with the plaintiff's rights. In the case at bar, the purchaser at the Probate Court sale bought the interest of the remaindermen and paid for it, and it

seems to us out of the question to contend, that such a possession was consistent with, or in acquiescence of, the claim of the remaindermen. Besides, as has been already shown, the Supreme Court of Alabama, in the cases of Matthews vs. McDade and Doe ex dem. Gosson vs. Ladd. *supra*, expressly holds that the possession, under such circumstances, is *adverse* to the remaindermen; and the same is declared by the Supreme Court of Massachusetts in the case of Melvin vs. Locks and Canals, and by the Supreme Court of New York in the case of Jackson vs. Johnson, *infra*. The possession in these cases was considered *adverse* because the purchaser claimed to have acquired the entire estate, *including* the interest of the remaindermen. The case at bar is even stronger, for here the remaindermen were parties to the proceedings for the sale of their interest in the lands in controversy, and received the benefit of the proceeds of the sale.

Observe again, it is declared in this case of McArthur vs. Carrie's adm'r., that after twenty year's possession, defects in the defendant's title become immaterial; however defective the title in the beginning, such defects are cured and removed by lapse of time. The title and the presumptions in its favor cannot be overturned, to use the language of the court in this case, "*by proving that the title was, in its inception, defective.*" The plaintiffs in the case at bar are attempting to do what the court, in this case, says can not be done. They undertake to defeat the defendant's title, by showing a technical defect in the proceedings in the Probate Court,

on account of which, it is claimed, the legal title in the heirs of Samuel P. Hudson did not pass to the purchaser.

Melvin vs. Locks and Canals.

The case of Melvin vs. Locks and Canals, 17 Pick, 255, is a strong case sustaining the principle for which we contend. In that case the suit was brought by the tenant in remainder, shortly after the termination of the life estate. The plaintiff was the child and heir of Joana Melvin, wife of Benjamin Melvin, and claimed title through his mother. Bejamin Melvin having issue by his wife, Joana, became vested with an estate for life, in the lands, as the tenant by the curtesy initiate. The defendants claimed under a conveyance, purporting to convey the fee, executed by Benjamin Melvin to Joseph Chambers, in 1782, under which he took possession, and he and those claiming under him continued in possession until the commencement of the suit. Joana, the wife of Benjamin Melvin, also signed the deed, but the deed contained no words of conveyance as to her and was not infended as a conveyance of any title in her, and was held to be void as to any interest she had in the lands. It also appeared that she was a minor, and under the disability of coverture, when she signed the deed. Joana Melvin died in 1826 and Benjamin Melvin, who held the life estate as tenant by the curtesy, did not die until 1830. The suit by the remaindermen was commenced July 30th, 1832, and in two years after the termination of the life estate; *held*, that though the deed from Benjamin Melvin, and Joana, his

wife, to Joseph Chambers executed in 1782 was void, as a conveyance of any interest held by the wife, and passed only the life estate of the husband, although it purported to convey the fee, yet the continued possession of the purchaser and those claiming under him would ripen into a title under the statute of repose. That while the possession of the purchaser was not *technically* adverse to the remaindermen, yet, after great lapse of time, a valid conveyance by the wife of her interest will be presumed in order to quiet such long possession, and this was done in this case, although the remaindermen brought suit within two years after the death of the life tenant.

The doctrine established in the Alabama cases here referred to finds strong support in the following language used by the Supreme Court of the United States in the case of Grignon's Lessee vs. Astor, 2 How. 343: "We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or in the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of

the estates of decedents, by order of those courts to whom the laws of the States confide full jurisdiction over the subjects."

Again, the same court, Hepburn vs. Auld, 5 Cranch, 276, uses the following language: "That a complete partition was made by an agreement, binding on all the parties who were interested, is in full proof. This partition would have unquestionably been protected in equity, and the majority of the court conceive that after such a lapse of time and such a long separate possession, a deed of partition ought to be presumed; and that the court, in which the verdict in the ejectment against Graham was found, might so have directed the jury.

Irregularities in the proceedings of orphan's courts, and even substantial defects are not of infrequent occurrence. In passing upon the validity of a sale of this sort as affected by lapse of time, this court, in Florentine vs. Barton, 2 Wall. 216, uses this language: "The proceedings on which the action of the court is grounded, are usually kept on separate papers, which are often mislaid or lost. A different doctrine would (especially after a lapse of over thirty years) render titles under a judicial sale worthless, and a mere trap for the unwary."

In Zellars Lessee vs. Eckert, 4 Howe 297, the court says: "Twenty years' possession by one of two tenants in common accompanied with an exclusive appropriation of the rents and profits, acquiesced in by the co-tenant, has been held to afford the presumption of a conveyance from the party out of the possession, and the same length

of time, coupled with other circumstances, a conveyance or release of an equity of redemption to the mortgagee in possession. The facts and circumstances in this case, in connection with the length of the possession and occupation, are much stronger in favor of allowing the presumption, than existed in several cases where the doctrine has been applied."

Again, in Ewing vs. Burnett, (11 Peters, 52), this language is used: "On the evidence in the cause, the jury might have presumed a release, a conveyance or abandonment of the claim or right of Williams, under a deed, in virtue of which he had made no assertion of right, from 1798, in favor of a possession, such as the defendant held from 1804; though it may not have been strictly such an adverse possession as would have been legal bar under the act of limitation. There may be circumstances which would justify such a presumption in less than twenty-one years, and we think that the evidence in this case was, in law, sufficient to authorize the jury to have made the presumption to protect a possession of the nature testified for thirty years; and if the jury could so presume, there is no error in overruling the first motion of the plaintiff."

In Phillipi vs. Phillipi, 115 U. S. 151, 157, a case which arose in Alabama this court recognize and apply the statute of repose and cite approvingly the cases in this State upon which we rely.

To the same effect are the following cases: Heghes vs. Edwards, 9 Wheat, 489; Robinson vs. Minor, 10 How. 627; Davis vs. Gains, 104 U. S. 386; Clement vs. Packeo, 125 U. S. 309.

Authorities Cited For Plaintiffs.

None of the authorities cited by opposing counsel contravene in the principle decided, the position for which we contend. As already stated, we do not question the authority of the case of Pickett vs. Pope, 74 Ala. 132, so much relied upon for the plaintiffs. In that case the sale was made by the life tenant, and the remainderman was not a party to the transaction, or in any respect benefitted thereby. In such a case and under such circumstances, the sale by the life tenant passes only his interest, and the remamderman is not thereby injuriously affected.

Identical in principle with this case is the case of Jackson vs. Mansuis, 2 Wend. 357. In this case the life tenant sold and attempted to convey the fee, and it was held that this did not cut off the remainderman. Of the same character, too, is the case of Orthwaine vs. Thomas et. al. 11 Am. St. Rep. 159. In this case there was not even a sale, but it seems that the life tenant made a deed of gift or grant to the city of Brooklyn, to a certain tract of land. The defendants claimed through the remaindermen, and entered into possession immediately after the termination of the particular estate, and were in possession when the suit was brought. It made no argument to show that the life tenant could not give away or sell their interest, and that their rights could not be affected by any alienation that he could make. In this case, it further appeared, that proceedings in equity were instituted by the life tenant, whereby he attempted to invest himself with the fee simple title. The remaindermen, whose interests were to be affected, however,

were not made parties to the proceedings, and, of course, their rights were held not to be affected by it. The court expressly placed the decision on that ground. If they had been parties to the chancery proceedings, the court held, they would have been precluded by the decree there made. Upon this point the authority is in our favor and not against us; for it will be remembered that in the case at bar the plaintiffs, the heirs of Mrs. Hudson, were parties to the proceedings in the Probate Court, for the sale of the lands in controversy, and it was their interests that were ordered to be sold, by the decree of the court.

Of the same character also is the case of Richard vs. Williams, 7 Wheat. 59. In that case William Dudly had only a life estate, with remainder over to his son Joseph Dudley. Being in possession and claiming only a life estate, of course his possession would not be adverse to the remainderman. The decision was placed upon this ground, and the distinction noticed is clearly stated by Judge Story in the opinion. He says: "In addition to all this, William never claimed any estate in fee, in the premises. His declaration uniformly was that he had a life estate only, and that upon his death they would descend to his son Joseph. Of the competency of this evidence to explain the nature of his possession and title, no doubt can reasonably be entertained. His title being evidenced only by possession, it must be limited in extent to the claim which he asserted." Of the same character was the case of McCorry vs. King, 39 Amer. Decisions, 155; so much relied on for plaintiffs.

That was also a sale by a life tenant, and was held not to affect the rights of the remaindermen.

There are several other decisions cited by opposing counsel, construing the statutes of limitation of other States;, though entirely correct in the principles decided and applicable in the locality where rendered, they do not apply in this State, because the statutes of limitation there construed, are not in force in this State. For instance, the case of Weatherhead vs. Barkersville, 11 How. 329, turned upon a construction of a statute of limitations of the State of Tennessee, which expressly provided that the statute should not operate against infants, persons of unsound mind, or *feme coverte*. Although the possession of defendants had continued for many years, the facts of the case showed that the plaintiff had been, all during this time, under the disability of coverture, and instituted her suit within a reasonable time after her disabilities were removed. This was, undoubtedly, a correct construction of the statute of Tennessee. The court, in fact, simply followed the express language of the statute. This court is well aware that this is not the law of Alabama. The statute of repose is not suspended in this State, by infancy, coverture, or other disability. This has been expressly decided in a number of cases, and is a well established rule of property. McCartney vs. Bone, 40 Ala. 536; Garrett vs. Garrett, 69 Ala. 429; Matthews vs. McDade, 72 Ala. 389. Nor will the operation of the statute be suspended by cases which have been legally adjudged to suspend the running of the ordinary statutes of limitation, as in

times of war, and like character. Harrison vs. Heflin, 54 Ala. 552. It is therefore manifest that if the case of Weatherhead vs. Barkersville, *supra*, had arisen in this State, under the reported facts, the decision would have been different.

The same may be said with reference to the case of Jackson vs. Johnson 5 Cowan, 74, also cited for the plaintiffs. The decision in this case turned entirely upon the statute of limitations of the State of New York, which at that time was twenty years. By express statutory provision, the statute did not run againt minors or married women, or persons under disabilities. and the court in construing the statute, held, that those under disability had twenty years after the removal of disability, within which to sue. The facts of the case show that the title was in the State, and was granted in trust to C. Colden, for the heirs of D. Colden. He took the legal estate, with the power of sale, and the heirs the equitable estate. The trustee afterwards sold to one Rogers, who went into possession without the payment of the purchase money. The trustee afterwards conveyed to the *cestuis que trustent*, thus vesting in the beneficiaries both the legal and equitable title. Some years later one Cooper, pretending to act as the attorney of C. Colden, the former trustee, conveyed to Johnson, the defendant, who claimed under Rogers, the original purchaser. C. Colden had previously divested himself of all title and right to convey and act as trustee, and the deed of the pretended attorney was therefore absolutely void, and of no effect, so far as the true owners

were concerned. As declared by the court, if had no more effect as a conveyance of title, than if made by a stranger without title. The court held, however, that though the deed was void and passed no title, it was sufficient to make the holding of Johnson, the party to whom it was made, adverse to the true owners, and was a repudiation of his allegiance to them. In the opinion the court says: "I assume, then, what to me seems undeniable, that December 13, 1793, the day of Cooper's deed to Johnson, the defendant's possession became adverse, and that the statute of limitations would have then commenced running, but for the disabilities of Mrs. Cooper. At this time she was an infant, and a *feme covert*, and it is well settled that if the disabilities exist when the right of action accrues, the statute does not begin to run until the party has survived them all." From this it appears that the court treated the possession of defendant as adverse, and the plaintiff was allowed to recover, solely upon the ground that in New York the statute of limitations did not run against infants, or persons under disabilities. This is not the law in Alabama, so far as the statute of repose, of twenty years, is concerned. This statute does run, in spite of all disabilities. See authorities, cited, *supra*. Upon the question as to the character of the evidence, showing that the possession of defendant was adverse to the plaintiff, from the date of the void deed by the attorney of C. Colden, the authority is in our favor, and not against us. Opposing counsel deny that the possession of defendants in the case at bar was adverse to the plain-

tiff, and yet the authority of this case, which they cite, upon this proposition is directly against them.

The case of Fleming vs. Burnam, 100 N. Y. 1, decides nothing in favor of the plaintiffs. In that case a purchaser had bought at a partition sale, and becoming uneasy about the title, had refused to comply with the terms of the sale, and the question was whether the court should compel him to accept the title, about which there might be a future uncertainty and litigation. The title offered him depended solely upon establishing a case of adverse possession, The court held, that a purchaser should not be forced to accept such a title, but was entitled to a marketable title, not depending upon parol evidence, and incumbered with so much uncertainty. The deed forming a link in the chain of title that was offered the purchaser, was executed by two or three executors, and one question was whether from lapse of time it should be presumed that the other executor had resigned or abandoned his right to act as such. On this question, applying the presumption indulged after such lapse of time the court says: "We do not intend to say that a jury might not be justified, upon the facts presented on the application in this case, in finding that Wm. McKie did renounce his executorship or refuse to act as executor, prior to February 14, 1833." Not having all the parties before it in such a way that their rights would be precluded by a decision, the court decided to pass upon the validity of the title, but simply declined that under the circumstances of that case, the purchaser ought not to be required to accept it, as it depended, for

its support, upon proof of adverse possession, and sufficient evidence might not be forthcoming at the proper time to sustain such adverse holding.

The case of Jewett vs. Jewett, 10 Gray, 31, turns entirely upon the construction of the statute of limitations of Massachusetts, which is not in force in this State, and has no application to the case at bar.

Laches.

The whole argument for the plaintiffs treats the proceedings in the Probate Court *as absolutely void.* Counsel admit that the petition to sell the lands was sufficient to confer jurisdiction upon the court. I have endeavored to show that the order of sale was sufficient upon a collateral attack, and that the proceedings of the court including the sale and conveyance made by the administrator, were in legal affect a substantial compliance with the requirements of the law. It is not true, therefore, as suggested by counsel, that the court might have withheld the order to make title. It was competent for the court, for sufficient reasons, to withhold the confirmation of the report, but the report shewing the sale and the payment of the purchase money, having been confirmed, the purchaser was entitled, to a deed, as a matter of right. Lowe vs. Guice, 69 Ala. 80.

The proceedings in the Probate Court, then, were not *void*, they were in strict conformity to law, and were irregular only in the respect mentioned. The purchaser having paid the purchase money and received a conveyance from the administrator, entered into possession, and

continued to hold the same, openly, notoriously and adversely to plaintiffs, and to all the world, for over twenty-four years prior to the bringing of the present suit. All of the plaintiffs, for a large portion of the time, and a part of the plaintiffs during all of this time, resided in the neighborhood where the lands were sold. The agreed state of facts upon which the case is submitted, shows that the lands were re-sold and conveyed to several different purchasers, and the plaintiffs stood by and suffered such purchasers to erect improvements, amounting in value toseveral times the original purchase price. The life tenant died in June, 1879, and after this every pretense of obstruction, by suit or otherwise to the plaintiffs was removed, and at this time they were not barred by the statute of repose of twenty years. Notwithstanding this, they continued to stand by for nearly ten years longer and permitted the purchaser under the probate sale, and those claiming under said purchaser, to use and treat the property as their own. The principal and most valuable portion of the land was sold and conveyed to defendants holding the same at the *present* time, after the death of the life-tenant, and since June, 1879. In 1884, the defendants having already invested many thousand dollars in large and valuable manufacturing enterprises upon the lands adjacent to the lands in controversy, laid out the city of Anniston, and built streets and street railroads through the lands in controversy, the improvements erected and money thus expended enhancing their value from the nominal price at which they sold at the probate court sale, to a present valuation of more than two hundred thousand dollars.

By this statement of facts, it is submitted, the plaintiffs are convicted of *leaches*, gross and inexcusable. "The period of time had expired after which it is the policy of the law to quiet past transactions, and when the courts will indulge, for this purpose, all reasonable presumptions." Doe ex. dem. Gossen, 77 Ala. 235. No defect in defendants' title would justify a recovery after the lapse of so many years. Time alone would cure all breaches,—restore all missing links. "If time," said Lord Plunkett, in words afterwards adopted by Lord Brougham, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass by which he metes out incessantly, those portions of duration, which render needless the evidence that he has swept away." Statesman, in time of George III. by Lord Broughman, 3d Ed., 227, note.

Woodstock Iron Company vs. Fullenwider.

In the case of the Woodstock Iron Company et al. vs. Fullenwider et al., 87 Ala. 584, the Supreme Court of Alabama simply follows its previous decisions, applying the statute of repose. Opposing counsel have made a vigorous, not to say savage assault, upon this decision. To them it seems incredible that the court should presume a grant from the plaintiffs, or that a bill in chancery had been filed, or that the proceedings in Probate Court were regular divesting their title. Is this presumption

more incredible than without evidence, save lapse of time, to presume an act of parliament, Delarue vs. Church, 2 L. J. Ch. 113, or an act of the legislature, Wilson vs. Holt, 83 Ala. 529, or an administration upon an estate, Gannt's Admr. vs. Phillips, 23 Ala. 275, or a valid order of sale from the Probate Court, Wyatt vs. Scott, 33 Ala. 313, or anything else necessary to quiet long possession, McArthur vs. Carrie's Admr., 32 Ala. 75? It is an ancient, but sound maxim, that "antiquity of time justifieth all titles and supposeth the best beginning the law can give them." Johnson vs. Barnes, L. R. 7 C. T. 593.

The plaintiffs received the benefit of the purchase money for the lands in controversy at the probate court sale; it was their interest in the lands that was sold. The proceedings in the probate court for the sale of the lands were not void, they were irregular, and except as aided by lapse of time, insufficient to pass the full legal title to the purchaser. The purchaser, however, received a conveyance to the property, and continued in possession, under claim of ownership, for over twenty years. Conceding all that is claimed by opposing counsel, the fact remains that the purchaser was in possession of the lands, having bought the interest of the plaintiffs and paid the purchase money, the benefit of which had been received by the plaintiffs. If it be admitted that the plaintiffs had the option of ratifying or disaffirming the sale, they did not have forever to do it. Though it be conceded that the deed of the administrator, conveying their interest, was, at the time it was made, ineffectual

to pass the legal title, it was sufficient to create an adverse holding, the purchaser being invested with a perfect equity and claiming under the deed, which, at least, was color of title. It cannot be doubted under such circumstances, if the proceedings in the probate court were absolutely void, that it was competent for the remaindermen to go into equity, and upon offering to do equity, disaffirm the sale and annul the same. The fact that the purchaser was in possession, claiming to have bought their interest and holding a deed to the same, the remaindermen being the beneficiaries of the sale, takes the case out of the rule declared by the authorities cited by opposing counsel, that a void deed casts no cloud upon a title. The cases cited by counsel were cases where the bill was filed by parties in possession, seeking to cancel void deeds in the hands of persons out of possession. The case is very different where the person holding the imperfect title is in possession, holding under a deed as color of title, with equitable rights, as against the remaindermen, that from lapse of time will ripen into a perfect title, and the owner of the true title is out of possession, with the life estate in his way, preventing a suit at law. In such case the remaindermen must go into equity or he will be remediless. The jurisdiction in such case is akin to that for quieting titles by bills *quia timet*, or to prevent the removal or destruction of personal property, by injunction or otherwise. The court says: "The *laches* here imputed to the plaintiffs is the fact of having allowed the probate court proceedings to remain unassailed for over twenty years—proceedings under

which though void at law a good equitable title to the reversion had been acquired, accompanied with possession and claim of ownership on the part of the purchaser and her sub-vendees during the whole of this long period." The authorities cited in the opinion of the court fully sustain the decision on this point: Aikin vs. Suttle, 4 Lea, 105, and cases cited; 3 Pom. Eq Jur. §§ 1220, 1397, 1399, note 4; 1 High, Inj., 2d. Ed. § 330; 3 Wait, Act. & Def. 190, 191; Plant vs. Barclay, 56 Ala. 561; Johnson vs. Johnson, 30 Ill. 215; Stout vs. Cook, 37 Ill. 283; Marston vs. Rowe, 39 Ala. 722; Woodstock Iron Company vs. Fullenwider, 87 Ala. 584, 588. This case has been followed and approved in the following cases: Lansden vs. Bone, 90 Ala. 446; Knabe vs. Burden, 88 Ala. 436, 441; Lowry vs. Davis, 8 South. Rep. 79. ✕

The case of Bone vs. Lansden, 85 Ala. 562, cited and relied on by opposing counsel as denying the right of remaindermen to file a bill to remove a cloud from their title does not establish any such doctrine. In that case the husband and wife executed a warranty deed to the wife's separate estate as security for the husband's debt. The wife died, and by virtue of the laws of Alabama the husband became entitled to a life estate in her lands, which life estate passed immediately to the grantee in the deed, under the covenants of warranty contained therein. The heirs of the wife then filed a bill to cancel the deed, *as a whole*, as a cloud on their title. This was refused by the Supreme Court, because the deed was not *wholly* void, for it had passed the after acquired life estate of the husband, and was valid as to that. If the

✕ Buckman v. Wilson
43 Fed. Rep. 648

heirs had recognized this in their bill, and had prayed that the deed be declared void *so far as the reversion was concerned*, it is not to be doubted they would have obtained relief to that extent; but their bill was not so framed. This in fact was so held upon a second appeal after the bill had been properly amended. Lansden vs. Bone, 90 Ala. 446.

The Federal Court Will Follow the Decision of the State Court.

As has been shown, the decisions of the Supreme Court of Alabama are uniformly consistent with the decision which that court made in this case, several of its previous decisions being in point, and decisive of the question involved in this case. These decisions settle a rule of property upon which numberless titles depend, and even if the Federal Court should not concur in the correctness of these decisions, it would, nevertheless, accept them as final and conclusive upon cases arising in the State of Alabama. The uniform rule of the Federal Court since its organization has been to follow the decisions of the State Court, where they establish rules of property, or in the construction of its statutes or its fundamental law. In Phillipi vs. Phillipi, 115 U. S. 151, which arose in Alabama, this court, Mr. Justice Woods delivering the opinion, fully recognize and adopt the statute of repose as applied in Alabama and cite approvingly the Alabama cases upon the question.

On this point, the following language used by Mr. Justice Woods in Barrett vs. Holmes, 102 U. S. 651, a case from Iowa, is instructive: "By these decisions the Supreme Court of the State has established a rule of

property in the State of Iowa which is binding on this and other courts of the United States."

Upon the particular question here, the case of Beauregard vs. the city of New Orleans, 18 How. 497, is also in point. The decision in that case is thus stated in the head note: "This court follows the decisions of the State Courts in the construction of the laws constituting their local jurisprudence. *Hence*, when the State Courts of Louisiana have carefully and laboriously considered the precise questions raised in the present case, which have reference to the jurisdiction of the District and Probate Courts, and to the effect of sales made by their orders, this court will receive those decisions as the best evidence of the law on these subjects."

And, in Jackson vs. Chews, 12 Wheat 153, it was held, that the courts of the United States will follow the highest court of a State settling a rule of construction of devises of lands.

Again in the recent case of Bauserman vs. Blunt, 147 U. S. 647, it is held that this court will follow the State Court in the construction of a statute of limitations of the State, even though the Circuit Court had decided the question differently before the decision of the State Court.

Without undertaking to review the cases at length, it will be sufficient to cite them: Morgan vs. Curtenius, 20 How. 1; Town of Ettowah vs. Perkins, 94 U. S. 260; League vs. Eagery, 24 How. 264; Polk's Lessee vs Wendall, 9 Cranch, 87; Fairfield vs. County of Gallatin, 100 U. S. 47; Olcott vs. Supervisors, 16 Wall. 678;

Township of Elmwood vs. Marcy, 92 U. S. 289; State Railroad Cases, 92 U. S. 575; Smith vs. Kernochan, 7 How. 198; Neamith vs. Sheldon, 7 How. 812; Williamson vs. Berry, 8 How. 565; Bucker vs. Rwy Co., 125 U. S. 555,-582.

The cases cited upon the brief of opposing counsel do not overturn the rule for which we contend. On the contrary, in each of these cases the rule is recognized, and the particular cases referred to are distinguished as not coming within the rule, because of their peculiar facts. For instance, in Burgess vs. Seligman, 107 U. S. 20, the court held that it was not bound by the decisions of the Supreme Court of Missouri, because the decisions of that court were rendered subsequent to the decision of the case in the Circuit Court of the United States from which the appeal was taken. And see contra Bauseman vs. Blunt, 147 U. S. 647. But the court recognized and approved the rule, in the following language, which is peculiarly applicable to this case: "The existence of two co-ordinate jurisdictions in the same territory is peculiar; and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the constructions of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is."

The case of Carroll County vs. Smith, 111 U. S. 556,

was placed upon similar grounds. In that case it was held that the Federal Court could not follow the State court, because the decisions in the State court were in conflict with previous decisions which were rendered by the Federal Court upon kindred questions and affected rights of citizens of other States in litigation in the Federal Court and acquired before the decisions in the State court were made.

In the case of the City of Chicago vs. Robbins, 2 Black. 418, the question presented did not involve any rule of property or any question affecting the titles to lands in the State of Illinois. The question there presented was the liability of a corporation for negligence, which resulted in the injury of the plaintiff. The court, however, in the opinion, fully recognized the rule for which we contend, in the following language: "Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the State Courts."

In Gibson vs. Lyon, 115 U. S. 439, the case arose in Pennsylvania, where two actions of ejectment were allowed. The only point decided in that case is that a single verdict and judgment in ejectment in the State Court, would not be conclusive against the rights of the plaintiff in the Federal Court. In the decision the court in this case again recognizes the rule for which we contend.

It seems unnecessary to discuss the rulings of the court upon objections to testimony. The whole question involved is presented by the charge given to the jury which is assigned as error. If I am correct in the contention here made the charge was not erroneous and the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

JOHN B. KNOX,

For Defendants in Error.

FILED
MAR 29
JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 329.

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Reply Brief of J. A. W. Smith for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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In the brief of Mr. John B. Knox, for defendants, it is insisted that the Court should construe the language of the order of sale that "said administrator introduced witnesses" to sustain the petition to mean that he introduced *the depositions* of witnesses. The word "witnesses" has a definite and legal meaning, and there is no field for construction so as to place any other meaning upon it. The following definitions of the words "witness" and "deposition" show that the one means the person whose evidence is given, while the other means the evidence itself, and which is taken in writing in answer to interrogatories propounded to the witness.

Witness, *n*, 4 (law): (*a*.) One who testifies in a cause or gives evidence before a judicial tribunal; as the *witnesses* in court agreed in all essential facts. (*b*.) One who sees the execution of an instrument and subscribes it for the purpose of confirming its authenticity by his testimony; one who witnesses a will, a deed, a marriage, or the like.—*Webster's Unabridged Dictionary.*

Witness, *n* (law): A person who gives evidence to a judicial tribunal; a deponent.—*Worcester's Dictionary.*

Witness, *n*, 5 (in law): (*a*.) One who gives testimony on the trial of a cause; one who appears before a court, judge, or other officer, and is examined under oath or affirmation. (*b*.) One whose testimony is offered or desired and expected. (*c*.) One in whose presence or under whose observation a fact occurred. (*d*.) One who, upon request by or on behalf of a party, subscribes his name to an instrument to attest the genuineness of its execution; more exactly, an *attesting witness* or a *subscribing witness*.—*Century Dictionary*, 24.

Witness: One who, being sworn or affirmed according to law, deposes as to his knowledge of facts in issue between the parties to a cause.—2 *Bouvier's Law Dictionary.*

Deposition, *evidence*, is the testimony of a witness reduced to writing in due form of law, taken by virtue of a commission or other authority of a competent tribunal.—1 *Bouvier's Law Dictionary.*

Deposition, *n*, 4. Declaration; assertion; specifically in *law* testimony taken under interrogatories, written or oral, before an authorized officer, to be used as a substitute for the production of the witness in open court.—*Century Dictionary*, 6.

Deposition, *n*, 6 (law): The act of laying down one's testimony in writing; also, testimony laid or taken down in

writing, under oath or affirmation, before some competent officer, and in reply to interrogatories and cross-interrogatories.—*Webster's Dictionary.*

Counsel for defendants contend that the Court should construe the language of the order of sale to mean that proof of the necessity of the sale was made by *legal* rather than by *illegal* evidence. If the probate court was one of general jurisdiction, this Court would *presume* that the order of sale was sustained by legal evidence, but it will be remembered that the probate court is one of *limited* jurisdiction, and that it is a *jurisdictional* requirement that proof shall be made as in chancery cases, which the record must show on its face. No jurisdictional fact will be *presumed.* If the order of sale had recited that *legal* evidence was introduced to sustain the petition, it would be insufficient. It should show that the probate court determined *from evidence taken, as in chancery cases,* that a necessity existed for the sale of the lands, and, failing to show this jurisdictional fact, the proceedings are void. If the court should decide that only *legal* evidence was relied on in the probate court, such conclusion would result from *presumption* rather than a *construction* of the language of the order of sale.

The case of Carter *vs.* Waugh, 42 Ala., 453, does not in anywise conflict with the foregoing definitions. In that case the order of sale recited that the "administratrix having heretofore filed in this court, on the 17th October, 1865, *interrogatories to be propounded* to James L. Waugh and Thomas J. Rowlen in said cause and the testimony of said witnesses *regularly taken and returned by the commissioner,* * * * and the court, having *read the evidence*

of the witnesses aforesaid submitted," is satisfied therefrom of the necessity of the sale. For irregularities in the taking of such depositions in that case they might have been suppressed. But it is clear that the decree was not void.

In Bibb *vs.* Bishop the order of sale *recited* that the testimony was taken by a commissioner and was *filed among the papers of the case.* Here was a direct reference *in the order of sale* to the depositions on file, *which made them a part of the record under* the rule laid down in *Bland* vs. *Bowie,* 52 *Ala.; Goodwin* vs. *Sims,* 86 *Ala., and Hood* vs. *Disston,* 83 *Ala.*

The order of sale is dated February 15, 1866 (Record, pp. 34, 35), while the depositions in the record were taken February 10, 1866. The failure to order the deed made is as great a defect as was the failure to give the bond required in *Bright* vs. *Boyd,* 1 *Story.*

LACHES.

The contention of the defendants is—

"That whenever there is an estate for life in one person and an estate in remainder or reversion in another, whether such estate be created by deed or will or by the law, and *there is a power to sell the fee,* and such sale is made, though defectively, during the life estate, and the purchaser holds open, notorious, and uninterrupted possession for more than twenty years, claiming the fee, the remainderman or reversioner is barred, though he sue the day after the life tenant dies."

Upon this proposition of law plaintiffs in error join issue. The statutes of Alabama (original brief, page 15) require actions for the recovery of land by one not under disability

to be commenced within ten years "*after the cause of action has accrued.*" A longer time is given to parties under disability, "but no *disability* shall extend the period of limitations so as to allow such action to be commenced or entry or defense made after the lapse of twenty years *from the time the cause of action accrued.*" So there is no statute in Alabama fortifying defendants' position. If maintained at all it must be upon some principle of law "broad" enough to overcome the positive statutory laws of the State, which are plain and unequivocal in their provisions. As opposed to the proposition contended for, see *Jewett* vs. *Jewett*, 10 *Gray*, 31; *Tilson* vs. *Thompson*, 10 *Pick.*, 362; *Stevens* vs. *Winship*, 1 *Pick.*, 317; *Fleming* vs. *Burnham*, 100 *N. Y.*, 1; *Jackson* vs. *Johnson*, 5 *Cowan*, 74; *Weatherhead* vs. *Barkersville*, 11 *Howard*, 329; *Redfield* vs. *Parks*, 132 *U. S.*, 239.

The case of Kelly *vs.* Hancock, 75 Ala., 229, has no application, as there it was the *life tenant* whose right was defeated. In all Alabama cases cited in support of the foregoing proposition, excepting the case of W. I. Co. *vs.* Fullenwider and the later case of Lowery *vs.* Davis, the right to bring *the action then brought* had existed for twenty years and the court simply declined to extend the time beyond twenty years on account of some *disability* of the plaintiffs to sue. In other words, the *cause of action* had accrued more than twenty years before the suit was brought.

Rule of Property.

If the decisions of the State court had been so long acquiesced in as to establish a rule of property, to the effect contended for by defendants, then it might be that this Court would not inquire into the principle of law upon which it

was founded, but no such rule has been established. (*See Pickett* vs. *Pope*, 74 *Ala.*, 122; *Pendley* vs. *Maddison*, 83 *Ala.*, 484.) The case of Fullenwider *vs.* Woodstock Iron Co. was decided but a few days before this suit was brought. The Constitution of the United States confers jurisdiction on the Federal courts to try suits between citizens of different States. It was not the object of the Constitution to confer *a privilege* upon the court, but *to guarantee to litigants who are citizens of different States the judgment of the Federal court upon questions affecting their rights.* If this court is to blindly follow and adopt the opinion of the State court, then the *constitutional* guaranty of the right of citizens of different States to have *the judgment* of the Federal court is of no practical benefit. (*Burgess* vs. *Seligman*, 107 *U. S.*, 32; *Carroll* vs. *Smith*, 111 *U. S.*, 562; *Gibson* vs. *Lyon*, 115 *U. S.*, 439; *Clark* vs. *Bever*, 139 *U. S.*, 96; *B. & O. Railroad* vs. *Baugh*, 149 *U. S.*, 368.)

Recently an opinion was delivered by the supreme court of Alabama practically overturning the case of Woodstock Iron Co. *vs.* Fullenwider. Afterwards, upon application for rehearing, the opinion was withdrawn. The case is styled "D. C. Robinson *et al. vs.* Wm. H. Pierce *et al.*, and is now under consideration by the supreme court of Alabama. The opinion, which was withdrawn, discusses the doctrine of prescription at great length and reviews the Alabama and other decisions.

Respectfully submitted.

J. A. W. SMITH,
Attorney for Plaintiffs in Error.

FILED
MAR 29 1894
JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

Term No., 329.

HARRIET A. BALKAM ET AL., PLAINTIFFS IN ERROR,

vs.

THE WOODSTOCK IRON COMPANY ET AL.

Supplemental Brief of John B. Knox, of Counsel for Defendants in Error.

Counsel for plaintiffs in error refers in his supplemental brief to a case now pending before the supreme court of Alabama of Robinson *vs.* Pierce as being in conflict with the decision of that court in Woodstock Iron Company *vs.* Fullenwider (87th Ala., 584) and other cases cited by me in the principal brief. It would seem to be a sufficient answer to this to say that the supreme court of Alabama has made no decision even in the matter of the case referred to, since the opinion in that case has been recalled and is still pending before that court upon an application for a rehearing, and no authorized or certified copy of the opinion can be obtained.

It is not true, however, that the opinion which was announced and which has been recalled is in conflict with the

Fullenwider case or in any sense weakens the force of that decision. The case in question is clearly distinguishable and was so regarded by the court from Fullenwider's case. There was, in fact, in this case no attempt or intent to execute the power of sale conferred upon the trustee. The sale was, in fact, made by the life tenant who received the purchase-money. Says the court in the opinion: "It is "manifest that in neither instance was the purchase-money "paid to the trustee, and that in both cases the muniments "under which the immediate and subsequent purchasers, "including all the present respondents, held and hold show "that the money was paid to Mrs. Robinson, the life tenant, "and not to the trustee."

After reviewing the facts the court reached the conclusion that the deeds in question were void on their face and wholly inoperative as a conveyance of any interest of complainants, nor was it a cloud on their title. McClellan, justice, who delivered the opinion in that case, thus concludes:

"There being no cloud on complainants' title, the second inquiry suggested above, namely, whether failure for twenty years of a tenant in remainder to seek, pending the life estate, the removal of a *mere* cloud on his title will authorize a presumption that he has lost his rights to the land, need not be decided. The cases of Woodstock Iron Co. *vs.* Fullenwider (87 Ala., 584) and Lowry *vs.* Davis (8 So. Rep., 79) hold that such a result would ensue. The conclusion reached by the court in each of those cases may be safely rested on the laches of the remaindermen, not with respect to filing a bill to remove a cloud from the title, *but in respect of their delay to file bills disaffirming the sale, offering to make the purchasers whole, and praying that the sales be set aside*, etc., etc. The writer concurred in the former of those cases and followed it in the latter."

And see the opinion of the same learned judge in Lansden *vs.* Bone (90th Ala., 446; 8th So. Rep., 65, 66) and Knabe *vs.* Burden (88th Ala., 436–441; 7th So. Rep., 92–94).

It is manifest, then, that though the court should adhere to the opinion in this case, which result cannot, of course, be anticipated, such a conclusion would not in any sense militate against the contention made by us or impair the force of the decisions upon which we rely, which have become a rule of property in Alabama.

Respectfully submitted.

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